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THE  
AMERICAN AND ENGLISH  
RAILROAD CASES.

A COLLECTION OF ALL THE  
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA  
AND ENGLAND.

EDITED BY  
WILLIAM M. MCKINNEY.

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VOLUME LI.

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STOCKTON, ATTORNEY GENERAL

v.

CENTRAL R. CO. OF NEW JERSEY *et al.*

(*New Jersey Court of Chancery, August 25, 1892.*)

**Lease—Power of Railroad Company—Legislative Authority.**—A railroad company cannot lease or dispose of any franchise needful in the performance of its obligations to the state, without legislative consent.

**Sufficiency of Title of Act—Constitutional Law.**—The formation and regulation of railroads are subjects naturally and properly related to and connected with each other, and are both germane to the object which is expressed by their being coupled in defining the title of an Act entitled "An Act to amend an Act entitled 'an Act to authorize the formation of railroad corporations and to regulate the same'" (New Jersey Act, March 11, 1880.) This act is sufficiently broad in its terms to confer power upon railroad corporations chartered by special law.

**Statute Regulating Railroad Leases—Requirement of Legislative Consent—Special Legislation.**—New Jersey Act of May 2, 1885 entitled "An Act respecting the leasing of railroads," forbidding the leasing of any railroad unless the consent of the legislature is first obtained, and providing that such consent may be obtained by submitting a draft of the proposed lease to the legislature for its approval by an act, is constitutional, and is not open to the objection that it contravenes the constitutional prohibition of special legislation.

**Lease of Railroad to Foreign Corporation—Device to Evade Statute.**—Where a domestic railroad company is forbidden to lease its road and franchises to a foreign corporation it will not be allowed to execute a lease to a domestic corporation which was promoted and is controlled and practically owned by a foreign corporation. In this case the lease by the Central Railroad Co. of New Jersey of its road and franchises to the Port Reading R. Co. is but a device to disguise the real nature of the transaction which consisted of a lease to the Philadelphia & Reading R. Co.

**Corporate Excess of Power—Public Policy—Action by Attorney General.**—Where a corporate excess of power tends to the public injury, or to defeat public policy, it may be restrained in equity at the suit of the attorney general.



**Same—Unauthorized Lease—Combination of Coal Producers and Carriers—Monopoly.**—A railroad company of this state leased its franchises and roads to a railway corporation of another state. The lease was not only unauthorized, but was expressly forbidden by law. Its effect was to combine coal producers and carriers, and to partially destroy competition in the production and sale of anthracite coal, a staple commodity of the state. *Held* to be a corporate excess of power, which tends to monopoly and the public injury.

APPLICATION by John P. Stockton, attorney general of New Jersey.

On order to show cause why injunction shall not issue. Heard upon information, exhibits, and affidavits, answers of the defendants, and limited proofs taken under order of the chancellor, in conformity with the provisions of rule 121. The object of the information is to have a certain indenture of lease made between the Central Railroad Company of New Jersey and the Port Reading Railroad Company, and also a certain tripartite agreement between the Central Railroad Company of New Jersey, the Port Reading Railroad Company, and the Philadelphia & Reading Railroad Company, decreed to be *ultra vires*, and therefore void; and void also upon the ground of public policy, in that they tend to create a monopoly of the anthracite coal trade within the state, by stifling competition between the contracting corporations, and thereby to increase the price of anthracite coal to the inhabitants of the state. And to effectually destroy the effect of such lease and agreement, under which the property and franchises of the Central Railroad Company of New Jersey have already been delivered to the Port Reading Railroad Company, it seeks a mandatory decree which shall enjoin the Port Reading Railroad Company to surrender and return to the Central Railroad Company the corporate franchises and property, and a restrictive decree which shall perpetually restrain the Port Reading Railroad Company from hereafter controlling and intermeddling with such franchises and property, and the three corporate defendants from all future combinations to do that which will arbitrarily increase or tend to increase the price of coal to the inhabitants of New Jersey. I am asked to now issue an injunction that will, temporarily at least, effect all these ends.

The Central Railroad Company of New Jersey was incorporated by special act of the legislature of this state, entitled "An act to incorporate the Somerville & Easton Railroad Company," approved February 26, 1847. Before then—on the 9th of February, 1831—the Elizabethtown & Somerville Railroad Company had been incorporated, with power to construct a railroad from Elizabethtown to Somerville. The Somerville & Easton Railroad effected a continuation of rail-

road communication from Somerville to Phillipsburg, on the Delaware river, opposite Easton, Pa. By a supplement to the charter of the Somerville & Easton Railroad Company, approved February 22, 1849, that company was authorized to purchase the Elizabethtown & Somerville Railroad, and it was provided that the two railroads should be controlled by the charter of the Somerville & Easton Railroad Company, and that the controlling company should thereafter be called the Central Railroad Company of New Jersey. The purchase was consummated on the 1st day of April, 1849. In 1860, by another legislative act, the Central Railroad Company was authorized to extend its road to the New York bay, at or south of Jersey City. From time to time, by legislative act, the capital of the company was increased, until now the stock outstanding amounts in round figures to about \$22,500,000 of an authorized capital of \$30,000,000. Besides this large capital, the company has an indebtedness of upwards of \$45,000,000. It owns, leases, or controls more than 40 tributary railroads. It has a large and prosperous business, and earns a respectable dividend upon its capital stock beyond the payment of the interest upon its indebtedness and its other fixed charges. Its assets exceed in value its outstanding capital stock and its indebtedness, which together aggregate, as has been indicated, more than \$67,000,000. In 1871 it leased the Lehigh & Susquehanna Railroad, running from Wilkesbarre to Easton, in Pennsylvania, from its owner, the Lehigh Coal & Navigation Company, a corporation of Pennsylvania, and also purchased the rolling stock and other equipment of that road. This leased railroad extends through a valuable portion of the anthracite coal region in Pennsylvania. About the same time the Central Railroad Company also invested in coal lands, by organizing, or causing to be organized, the Lehigh & Wilkesbarre Coal Company, and becoming the owner of all, or substantially all, of its capital stock. This coal company issued bonds, which the Central Railroad Company guaranteed. In virtue of its interests in the anthracite coal region and the advantageous location of its roads the Central Railroad Company has become a considerable coal carrier, not only from the mines of the company in which it is interested, but also from the mines of other miners not having railroad facilities, in and through the states of New Jersey and Pennsylvania to the New York harbor, which is the greatest distributing point for anthracite coal in the United States. The Philadelphia & Reading Company, a corporation of the state of Pennsylvania, is also possessed of railroads running into the anthracite coal region of Pennsylvania, and is an extensive coal carrier. Save a few shares, used to qualify di-

rectors, it is the owner of the entire capital stock of the Reading Coal & Iron Company, which, in the year 1891, produced from its collieries 8,203,465 tons of coal, being one-fifth of the total produce of anthracite coal from Pennsylvania during that year. Along the lines of the Philadelphia & Reading Railroad there are also other coal miners, who find a market for their coal by the means of transportation it affords. The capital stock of the Philadelphia & Reading Company, at par, amounts to about \$40,000,000, and its indebtedness to more than \$160,000,000, all of which is balanced by assets alleged to be of equal value. The annual report of the directors of this company for the year ending November 30, 1891, referring to the coal lands controlled by that company, contains this statement: "The coal lands comprise in extent about thirty-two per cent. of the entire anthracite coal fields of the state, and, taking into account the aggregate thickness of the veins on the company's lands, and the greater proportionate depletion of the estate in the other regions, which has been going on for many years, it must be conceded that we have at least fifty per cent. of the entire deposit remaining unmined." Throughout this report, and reports similar, whenever the lands of the Reading Coal & Iron Company are alluded to, they are spoken of as the property of the Philadelphia & Reading Railroad Company, and that company itself as the property of the railroad.

It appears also that the Philadelphia & Reading Railroad Company has become the lessee of the Lehigh Valley Railroad Company, a corporation of the state of Pennsylvania, which, in turn, is the lessee of the Easton & Amboy Railroad Company, a corporation of this state, having a line of railroad from Easton, Pa., to Perth Amboy. The Lehigh Valley Railroad Company is a miner of coal to some extent, and possesses a railroad which runs through the anthracite coal region of Pennsylvania, and affords facilities for transportation of coal there mined to markets in this and adjoining states. For several months past competition between these three roads in the procurement and transportation of coal, and between each of them and the Delaware, Lackawanna & Western Railroad Company, the Delaware & Hudson Canal Company, and the Pennsylvania Railroad Company, each of which is possessed of interests in the anthracite coal region, and the means of transportation of coal therefrom, has materially reduced the price of coal to consumers in this state and elsewhere, to the loss of considerable profit to each of the companies named, which would not have been suffered if competition between them had not existed. It further appears that anthracite coal is a necessity to the people of

New Jersey, being the fuel that is most abundantly and cheaply obtainable, and most universally used in their homes and manufactories. The Philadelphia & Reading Railroad Company operates in this state, among other railroads, the Delaware & Bound Brook Railroad, which extends from Bound Brook to the Delaware river at Yardleyville, a few miles above Trenton, connecting with railroads to the anthracite coal region. It possessed and operated this road prior to the year 1890. On the 3d of November, 1890, A. A. McLeod, I. A. Sweigard, William R. Taylor, D. Jones, Robert S. Davis, and John Walker, Jr., all of whom were officers and employes of the Philadelphia & Reading Railroad Company, with others, organized the Port Reading Railroad Company, under the general railroad law of this state, designating in the certificate of incorporation its capital at \$2,000,000, divided into 20,000 shares of the value of \$100 each. The incorporators named became six of its directors, with six other persons, who were also connected with or friendly to the Philadelphia & Reading Railroad Company. The real business office of the company was fixed at the office of the Philadelphia & Reading Railroad Company in the city of Philadelphia, and a nominal office, to comply with the law of this state, was maintained at Kaighn's Point ferry in the city of Camden, belonging to the Philadelphia & Reading Company. On the same day that this railroad company was organized, Albert Foster, James K. Landers, W. H. Blood, F. W. Stone, and Charles H. Quarles, under the general corporation law of this state, formed the Port Reading Construction Company, with a capital of \$100,000, divided into 2,000 shares of the value of \$50 each. The incorporators of the company were all officers or agents of the Philadelphia & Reading Railroad Company. Forty shares of the stock, in all of the value of \$2,000, were subscribed for, and with that amount of money the company commenced business. The business office of this company was the office of the Philadelphia & Reading Railroad Company in the city of Philadelphia. Shortly after the organization of these two companies under the general laws of New Jersey the Port Reading Construction Company contracted with the Port Reading Railroad Company to build its railroad from a point on the Delaware & Bound Brook Railroad to a point on the Arthur Kill, opposite Staten Island, a distance of 20 miles, for \$1,500,000 in mortgage bonds of the Port Reading Railroad Company, and all the capital stock of the latter company, save 400 shares, which had been subscribed for by its incorporators, the proceeds of which subscription were paid to the state treasurer, in pursuance of the requirement of the statute that

\$2,000 for each mile of road to be constructed shall be deposited with the treasurer of the state at the time of the organization of the company.

Previous to the formation of these companies, the Philadelphia & Reading Railroad Company had purchased 300 acres of land at the proposed terminal of the Port Reading Railroad upon the Arthur Kill, and after the organization of the two companies this land was transferred to the Port Reading Railroad Company. When the contract for the construction of the Port Reading Railroad was executed, a mortgage for \$1,500,000 was made by the Port Reading Railroad Company upon its property and franchises, and the bonds secured thereby were transferred to the construction company, and that company thereafter immediately commenced to procure a right of way for the railroad company, and to construct its road. The moneys required in the prosecution of the work were had by loan to the construction company from the Philadelphia & Reading Railroad Company, and as well, when the bonds of the Port Reading Railroad Company could be negotiated, from the sale of them. In the official report by the president of the Philadelphia & Reading Railroad Company to the stockholders of that company for the year ending November 30, 1890, the president says: "In another place in this report the lack of means of placing the product of your mines upon the markets, and the consequent shrinkage of production in proportion to that of competing fields, is commented upon. A marked illustration of the necessity of providing additional facilities for the distributing of anthracite coal in New York harbor and all tide water points tributary thereto is found in the fact that at the time of writing this report there are more than one thousand cars loaded with coal standing on the side tracks in Jersey City because of the lack of dock facilities for transferring coal to vessels; and on account of the restriction which these limitations impose upon your traffic the management is now obliged to transport coal from Port Richmond through the Delaware river and around New York harbor, encountering all the perils of coast navigation at this season of the year, and at an expense largely in excess of all-rail freights. With the view to meeting these wants, and other disabilities under which your company has labored ever since the day it opened its mines, for want of unrestricted access to the waters of New York bay, the greatest distributing center in the country of anthracite coal, your board has determined to promote the construction of a line of road, to be under the control of your company, to extend from the vicinity of the terminus of the Bound Brook

Railroad, near Bound Brook, New Jersey, to deep water in Arthur Kill, a distance of twenty miles, at a point readily accessible to the waters of New York bay and New England ports by large vessels. Plans have been completed for the construction of this line, with adequate terminals for the storage and shipment of coal in quantities limited only by the demands of the market. Over three hundred acres of land have been acquired for terminal purposes, bordering on the waters of the Arthur Kill. Work will be speedily commenced, and prosecuted with vigor. Conservative estimates show that the earnings of this line will be sufficient to meet all charges on its cost, and leave a large surplus. It will furnish the means of supplying the markets with your proportion of the coal tonnage at all times. The advantage of the construction of this line in the increase of tonnage on nearly all other parts of the system, without regarding the increase of product of the coal and iron company, can scarcely be estimated, but it is certain that it will add a large increase of traffic earnings. It was anticipated that work on this line could have been commenced before this time, but it was found necessary to make several surveys in order to avoid all grade crossings of other railroads, and your board is pleased to announce that the line adopted is of favorable grades, and of almost perfect alignment; the maximum grade being only fifteen feet to the mile."

On the 12th of January, 1892, while the Port Reading Railroad Company was yet incomplete, only a few miles of a single track having been laid upon an unfinished roadbed, and it was without rolling stock of any kind, or depots, and its stock and bonds were substantially all in the hands of the Port Reading Construction Company, the Central Railroad Company of New Jersey entered into a lease with it, whereby it transferred to it for 999 years its entire railroad, together with the right to maintain and operate more than 40 tributary railroads, which it controlled by leases or through the ownership of the majority of capital stock, together with all laterals, extensions, sidings, turnouts, tracks, bridges, viaducts, culverts, rights of way, water rights and privileges, lands, shops, machinery, fixtures, depots, passenger, freight, and water stations, houses, buildings, structures, improvements, tenements, and hereditaments of whatever kind or description, and wherever situate, appertaining to the operation, maintenance, and renewal of said railroads which were then laid, leased, or owned by the Central Railroad Company, or which at any time thereafter, during the term of the lease, might be acquired by that company for railroad purposes; together also with all its ferries and rights of ferriage then

belonging or thereafter to be acquired by it, and all the stationary and locomotive engines, and the cars, tenders, trucks, and other rolling stock of the company, tools, implements, machines, and personal property of every kind and description, in use, or intended or adapted for use, upon or about the railroads and premises demised, or the business thereof; and also the rights, powers, and franchises, (other than the franchise of being a corporation,) and all the privileges which then or at any time thereafter during the term of the lease might be lawfully exercised and enjoyed by it touching the premises demised, including all rights in telegraph lines upon the railroad or the several branches thereof. The Central Company reserved to itself its office building in the city of New York, known as the "Central Building," and lands owned by it which are not adjacent to the railroad; or, if adjacent, and not in railroad use, provided, however, if the last mentioned lands, or any of them, should be subsequently needed by the lessee, they also would be surrendered. The Port Reading Railroad Company covenanted to pay to the Central Railroad Company annually enough money to enable it to pay its fixed charges at 7 per cent. upon its capital stock then issued, and such capital stock as should be issued thereafter under specified circumstances, and also pay it 50 per cent. of the lessor's earnings through the instrumentalities of the railways of the Central in excess of the fixed charges and seven per cent. upon the capital stock, up to 3 per cent. upon the outstanding capital stock of the Central; and also agreed to pay the taxes which should be assessed upon the capital stock and dividends of the Central, to keep the premises demised in repair, to insure the property, to save the Central harmless from all damages by reason of the operation of its road, or by reason of any failure in the performance of the duties required of it, and to provide and maintain terminals, stations, repair shops, and equipments, and maintain rolling stock and tools equal to the rolling stock delivered to it, so marked as to identify them. Betterments were to be made by the Central Railroad Company, if it pleased. It was to have 5 per cent. annually upon the moneys it should pay for the betterments, and was to be permitted to mortgage the demised property to secure the repayment of moneys it should borrow to enable it to make them. The Port Reading also agreed to keep accounts, which should be open to the Central's inspection, and to perform all the Central's existing contracts relating to the demised premises; also to procure traffic over the Lehigh & Susquehanna Railroad to a specified amount. It covenanted

that it would not divert nor permit the diversion from the Central of the Central's then traffic, or of any traffic which should thereafter be naturally tributary to it, but that it would foster and strive to increase traffic and the earnings of traffic over the Central's road, and the earnings of that road. It also covenanted that individual coal miners on the line of the Central's roads should have transportation for their coal without discrimination against them; that cars and transportation should be furnished to all coal miners who should be naturally tributary to the Central's system; and that the rates charged for transportation should be as low as the rates charged at any time for similar transportation by the Philadelphia & Reading Railroad Company from the Schuylkill region. All the stocks of various companies owned by the Central Railroad Company were, so far as concerned corporations included within the lease, to remain the property of the Central Company, and be used by it to enable the Port Reading Company to control those corporations. The lease was not to be assigned without the Central Railroad Company's consent. It was to take effect as of January 1, 1892, and the right of reentry was secured to the Central in case of any default upon the part of the Port Reading Railroad Company in the performance of its undertaking.

Upon the same day that this lease was executed, a tripartite agreement between the Central Railroad Company, the Port Reading Railroad Company, and the Philadelphia & Reading Railroad Company, in which the lease just referred to was incorporated, was entered into. This agreement recited that the lines operated by the three railroad companies were connected in New Jersey and Pennsylvania, and form continuous lines; also that the Central Railroad Company was willing to lease to the Port Reading Company if the Philadelphia & Reading would guaranty the performance of the Port Reading's covenants in the proposed lease; that the Port Reading was willing to lease if the Philadelphia & Reading would insure the increase of traffic that the lease contemplated; and the Philadelphia & Reading was willing to guaranty the lease because of the advantage it would have in the terminals of the Central Railroad and in the interchange of traffic with it. And it was thereupon agreed that the lease should be executed; that the consent of the stockholders of the Central and Port Reading Companies to the lease should be procured as counsel of the Philadelphia & Reading Company should instruct; that possession of the demised premises should be immediately given; that the payments to be made by the Port Reading Company, and



the covenants to be performed by it, were guarantied by the Philadelphia & Reading Company; that the Philadelphia & Reading would make the payments if the Port Reading should not make them, and that it would cause the Port Reading to perform its covenants; that the Port Reading Company should provide or procure, at Jersey City and in New York and Brooklyn and on the Arthur Kill, terminal facilities for the Philadelphia & Reading traffic, the Central Railroad Company having the privilege to provide such facilities, except at the Port Reading's terminal on the Arthur Kill, as betterments; that the traffic which would thereafter naturally go to the Central as its direct route should be secured to that road; that coal naturally tributary to the Central should go over it for as long a distance as possible; that coal naturally tributary to the Philadelphia & Reading, which was destined to the New York harbor north of Elizabeth, should go over the Central's road, at least from Bound Brook Junction; that coal for delivery on line of the Central's road, from mines tributary to it, should go over the Central, or, in event of its not going over the Central, that an equivalent for the loss of the freight rates should be credited in the Central's account; that traffic on the Eastern & Amboy Railroad and upon other Lehigh Valley lines destined to the Central terminals should go over the Central at least as far as from Roselle Junction to the terminal; that other traffic as then interchanged should be continued to be interchanged; that the Port Reading and the Philadelphia & Reading would maintain the present traffic of the Central, and increase it; that the Philadelphia & Reading would put \$2,000,000 of securities in trust, to secure its performance of the agreement; that in case of a termination of the lease and agreement, the Central shall have an interest equal to the Reading in the Central New England & Western Railroad Company and in the Poughkeepsie Bridge Company, upon its paying to the Reading one-half its expenditure for the Reading's interest, and assuming a due proportion of the obligations assumed by the Reading in securing that interest. The agreement of guaranty the assurance of traffic was to continue as long as the lease should last, and in case the lease should be forfeited the agreement should then be void. The lease was executed, upon the part of the Port Reading Railroad Company, by A. A. McLeod, its president, and William R. Taylor, its secretary; and the agreement of guaranty and assurance was also executed by those gentlemen as president and secretary, respectively, not only of the Port Reading Railroad Company, but also the Philadelphia & Reading Railroad Company.

On the 8th of April, 1892, the board of directors of the Central Railroad Company reported to the stockholders of that company that their railroads were then being operated by the Port Reading Railroad Company. Commenting upon the advantages of the lease and agreement, this report says: "It is intended to secure for your railroad its present traffic and its natural growth and development, and, in addition, by the guaranty of common interest, the benefit of whatever traffic is controlled and influenced by the Reading system, and is naturally tributary to your road and terminals. It prevents a diversion of traffic which might otherwise have resulted from the lease of the Lehigh Valley Railroad by the Philadelphia & Reading Company. It is fair to expect, as the further results of this alliance, with the co-operation of other large coal-producing companies, greater uniformity in the prices of coal, steadier employment for the laboring classes in the coal regions, the avoidance of needless and expensive competition between producers, and the establishment of economies which, without undue burden to consumers, will bring to the stockholders adequate returns for their capital. In both the lease and traffic contracts every safeguard had been provided for the preservation and development of your property. The independent organization of the Central Railroad Company will be maintained, to discharge its obligations directly to the stockholders and bondholders as well as to see that the provisions of the agreement are observed and the maximum rentals thereby secured."

The testimony of Mr. A. A. McLeod, who was president of both the Philadelphia & Reading and the Port Reading Companies when the lease and tripartite agreements were executed, has been put in the case upon the part of the informant. In it Mr. McLeod states, among other things, that the lease does not put it in the power of the Philadelphia & Reading road to raise or lower the price of coal without the co-operation of other coal carriers, but that it will possibly facilitate such co-operation. It would itself, he says, undoubtedly affect prices of coal at some points. In point of fact, the price of coal has risen at several places in New Jersey since the lease and agreement were made. Whether this is attributable to the lease does not distinctly appear, but it is quite clear that it is the purpose of the coal companies in which the railroads involved are interested to demand a greater price for the coal they sell. While the facts above recited remain admitted or uncontroverted, the answers deny that the defendants, or either of them, own any coal lands, or mine or sell any coal, and also that they, acting either separately or conjointly, can fix or increase the price of anthracite

coal, or create a monopoly in the business of mining or selling anthracite coal, or put an end to competition in the price or sale of coal.

*The Attorney-General and F. W. Stevens*, for informant.

*Benjamin Williamson, Samuel Dickson, and R. W. De Forrest*, for Central Railroad Company of New Jersey.

*Thomas N. McCarter, John T. Johnson, and John R. Emery*, for Philadelphia & Reading and Port Reading Railroad Companies.

MCGILL, Ch.—“It is a cardinal rule of the law of corporations,” said Vice Chancellor VAN FLEET, in *National Trust Co. v. Miller*, 33 N. J. Eq. 162, “that a corporation created by statute can exercise no power, and has no rights, except such as are expressly given or necessarily implied.” “It may also be considered settled,” said Mr. Justice VAN SYCKEL, in pronouncing the opinion of the court of errors and appeals in *Black v. Delaware & R. Canal Co.*, 24 N. J. Eq. 465, in which a lease of railroad franchises and property for 999 years was in question, “that a corporation cannot lease or dispose of any franchise needful in the performance of its obligations to the state without legislative consent,” and the law thus declared to be settled was reiterated by Mr. Justice DIXON, in the same court, in *Stewart v. Lehigh Valley R. Co.*, 38 N. J. Law, 513, in this language: “It is not open to dispute that such a lease as this can be valid only if sanctioned by the legislature. Nor is such sanction to be implied; it must rest upon a clear expression of the legislative intention. It must be gathered, in the first place, from the words which the legislature has used upon the subject; and if those words, construed according to their usual signification, declare the purpose to authorize a lease to a foreign corporation, or to a class of corporations which includes the plaintiff, we must give effect to such purpose. The court has no right to add to the words of the legislature or to substitute other words for them, in order to widen the power conferred; nor has it any more right to strike out words, or detract from their fair and ordinary meaning, for the purpose of restricting the grant. The duty of the court is one of interpretation merely.” To the same effect is the holding in the United States supreme court. *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 24 Am. & Eng. R. Cas. 58; *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 13 Am. & Eng. R. Cas. 658; *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 45 Am. & Eng. R. Cas. 607.

Authority  
to lease.

The validity of a lease of this kind is questioned in this case, and it has not been seriously contended that the lease can be sustained if clear legislative sanction for it is not found. It is claimed that such sanction is had in the amendment of March 11, 1880, to the seventeenth section of the general railroad act,

Statute  
relating  
to leases.

entitled, "An act to authorize the formation of railroad corporations, and to regulate the same." Revision, p. 930, (Supp. Revision, p. 828.) That section originally, so far as it bears upon the present question, was in this language: "And it shall be lawful for any corporation incorporated under this act, at any time during the continuance of its charter, to lease," etc. In 1880 it was amended by having interpolated in it, after the words "under this act," the words, "or under any of the laws of this state," so that the amended section is now, including the words which follow the word "lease," which remains as in the act, as follows: "And it shall be lawful for any corporation incorporated under this act, or under any of the laws of this state, at any time during the continuance of its charter, to lease its roads, or any part thereof, to any other corporation or corporations of this or any other state, or to unite or consolidate, as well as merge, its stock, property, and franchises and road with those of any other company or companies of this or any other state, or to do both; and such company or companies are hereby authorized to take such lease, or to unite, consolidate, as well as merge, its stock, property, franchises, and road with said company, or to do both, and, after such lease or consolidation, the company or companies so acquiring said stock, property, franchises, and road may use and operate such road and their own roads," etc.

It is insisted in behalf of the attorney general, as a matter of construction, that under the seventeenth section, as it originally stood, power was conferred upon a company organized under the general railroad law to make a lease of its road either to another company formed under that act, or to a company created by a special act of the legislature of this state, or to a foreign corporation,—that is, it might be lessor to a company of either of those characters; but that the law did not make it competent to take a lease from specially incorporated or foreign companies,—that is, to become the lessee of a company of any character other than one formed under the general railroad law. He insists that the effect and purpose of the amended act were to render such company competent to become lessee of "any corporation incorporated under this act, or any of the laws of this state," that is, that any cor-

poration incorporated under the general law might become lessee of the road of any company specially incorporated. In other words, his insistent, shortly stated, is that the design of the amendment of 1880 was to complete the powers of the company formed under the general railroad law, so that it could become either lessor or lessee of any other railroad company, but that it was not the legislative purpose thereby to extend the powers of specially chartered railroad companies. He claims that such interpretation of the meaning of the law of 1880 is made necessary by the restrictive language of the title of the act, and that, if the interpretation be that the amendment extends the powers of a corporation created by special act, then the law contravenes the provision of the constitution which declares that "every law shall embrace but one object, and that shall be expressed in the title." If the intention of the legislature was to give the interpolated words the meaning which the informant contends for, the method of expressing that intention was most unfortunate. It is observed that the power conferred consists of two parts, separated by a semi-colon. The first treats of the power to give a lease, and the second treats of the power to take a lease. Now, the interpolated words are put in the first part, so that the grammatical and natural meaning, and I think the only meaning of which the act is susceptible, is that power to lease is conferred upon the company incorporated by special act. If it had been intended to express the meaning that the informant contends for, the intention would accurately and easily have been effected by an interpolation in that part of the power which authorizes the taking of a lease. The meaning insisted upon is too forced to merit further discussion.

Passing to the consideration of the title of the act, I acquiesce in the informant's insistent that the rule is established that, where the meaning of a statute is doubtful, the title may be referred to for assistance in its elucidation because, under the constitution, the object of the act must be expressed in its title; and, before a law shall be declared to be unconstitutional, it will be read in the light of its title, to see if, within the fair bounds of that title, a reasonable interpretation may be given to it. That rule is invoked here to excuse and support the meaning contended for, but it is of no assistance. The meaning of the body of the act is not in doubt. The meaning of the title is that which counsel really questions. It is: "An act to amend an act entitled 'An act to authorize the formation of railroad corporations and regulate the same.'" The inquiry is, to what antecedent the words "the same" in this title relate. To railroad corpora-

tions generally, or to those only which are formed under the act? Does the object it expresses contemplate the formation and regulation of all railroads, or the formation and regulation of those only which may be organized under that law? These questions suggest ambiguity in the title of the law. If we refer to the body of the original act for an index to the legislative mind, we will find that which I described in *Montclair v. New York & G. L. R. Co.*, 45 N. J. Eq. 442, 40 Am. & Eng. R. Cas. 342, in this language: "Throughout the act the greatest care is taken, by express language prefacing certain of the sections, to confine the provisions of those sections to corporations formed under the act; but there are other sections, which concern proper regulations applicable to any railroad, that are not so prefaced, and in terms refer to 'any railroad,' indicating that the legislative intent was to enact a general law, which should regulate all railroad corporations, and at the same time authorize the formation of new ones. Perhaps the most striking indication of this intention is found in the last section of the act, (Revision, p. 935, § 127), where it is provided that the act may be altered, amended, or repealed, but such repeal or alteration shall not affect any corporation heretofore organized, unless the act making such repeal or alteration shall so expressly declare. It was evidently the legislative intent that the act should extend to all railroad corporations of the state. Its several sections, however, are so drawn as to distinguish in their application between corporations organized under that act and all corporations, whether formed under that act or otherwise incorporated. This distinction was evidently the result of an extended consideration of corporate interests, for in the last section of the act, looking to the maintenance of the distinction, it is provided that, when an amendment is intended to extend to corporations organized before the act was passed, it shall so expressly declare."

In the case from which I have just quoted I found it to be impossible to reconcile the body of the act with a narrow construction of the title, which would restrict the act's regulation of railroads to those companies which were formed under it. The object of the act appeared to be general provision for the organization and control of railroad corporations; the gathering of all, so far as could be constitutionally done, within one comprehensive, general law. That such has been the universally accepted signification of the law is evinced by its being known as the "General Railroad Law." That such has been the subsequent legislative construction of its object is shown by the frequent enactment of laws for the regulation of all railroads, however formed, en-

titled as supplements to the law discussed; and such construction has more than once, without being questioned, had judicial acceptance in this court. *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 11, 9 Am. & Eng. R. Cas. 590; *Mills v. Central R. Co.*, 41 N. J. Eq. 4, 24 Am. & Eng. R. Cas. 47. The title of the act in question may naturally be read to express the object of the law. It does express the object evinced in the body of the law, and does not necessarily restrict that body within narrower bounds than it assumes.

But does a law which purports to both form and regulate railroads embrace a single object? The constitution requires that each law shall have a single object, and that object shall be expressed in the title of the act. The language of the sentence in which this constitutional requirement is embodied is this: "To avoid improper influence which may result from intermixing in one and the same act such things as have no proper relations to each other, every law shall embrace but one object, and that shall be expressed in the title." Placitum, 4, § 7, art. 4. The requirement is to be construed in the light of the expressed reason for it. The evil condemned for which the remedy is prescribed, is not the uniting of properly related subjects in one act, but, the uniting of subjects that are foreign to each other, and which do not all tend to the promotion of a single object. Various subsidiary subjects, properly connected, and relating to one comprehensive subject may be united in the same law. The end aimed at is that each law shall have a single general object, which shall be stated in its title, and that all parts of the law shall be germane to that one subject. The purpose is that each distinct subject matter of legislation shall have independent consideration upon its merits, unaffected by the presence of foreign matter, which may tend to distract, confuse, or improperly influence; and that the title shall conspicuously indicate the general object of the act, so that the intrusion of the irrelevant matter may be readily detected, and if it should remain in the law, be without effect, because inimical to the title. This is the accepted interpretation of this provision of our constitution in numerous decisions of our courts. *State v. Town of Union*, 33 N. J. Law, 350; *Gifford v. New Jersey R. & Transp. Co.*, 10 N. J. Eq. 172; *State v. Newark*, 34 N. J. Law, 236; *Rader v. Township of Union*, 39 N. J. Law, 509, and 41 N. J. Law, 621; *Payne v. Mahon*, *Id.*, 292; *State v. Hammer*, 42 N. J. Law, 438; *Onderdonk v. Plainfield*, *Id.* 480; *Van Riper v. Plainfield*, 43 N. J. Law, 349; *Snipe v. Shriner*, 44 N. J. Law, 206; *New Brunswick v. Williamson*, *Id.* 169; *Bergen Co. Sav. Bank v. Township*

Sufficiency  
of title of act.

of Union, *Id.* 599; Vail *v.* Eastern & A. R. Co., *Id.* 237; Grover *v.* Trustees of Ocean Grove etc. Assoc., 45 N. J. Law, 399; Daubman *v.* Smith, 47 N. J. Law, 200; Bumstead *v.* Govern, *Id.* 368; Dobbins *v.* Northampton Tp., 50 N. J. Law, 496; Eastern & A. R. Co. *v.* Central R. Co., 52 N. J. Law, 267; Kirkpatrick *v.* New Brunswick, 40 N. J. Eq. 46. The formation and regulation of railroads are subjects naturally and properly related to and connected with each other, and are both germane to the object which is expressed by their being coupled in defining the title of the act; that is, as I have already said, the creation of a general scheme which is capable of dealing with all railroad affairs which may be within the legislative power. We are not to say that the object of a law is not expressed in its title when the language of the title is an enumeration of the subjects it embraces. That very enumeration may serve to more clearly express the general object. For instance, in Easton & A. R. Co. *v.* Central R. Co. *supra*, the title, "An act to cede to the mayor and common council of Jersey City certain lands of the state, now and heretofore under the tide waters of the Communipaw bay, and to establish a tide water basin adjacent thereto," was held by the supreme court to express with even unnecessary precision the single object of appropriating land owned by the state to public uses. I do not find any constitutional infirmity in the title to the act in question, and the language of the act appears to me to be sufficiently broad and comprehensive to confer the power contended for by the defendants.

My conclusion upon questions arising in this case, and hereafter stated, obviates the necessity of my passing upon this proposition, which was most strenuously insisted upon by the attorney general: that, even though the act of 1880 may confer the power to lease, that power impliedly, from the character of railroad corporations as *quasi* public bodies, is limited to leases designed for the public welfare, and does not warrant a lease in furtherance of a scheme to prevent competition, and create a monopoly. While I do not declare this insistence to be law, and accept it as a factor in the process by which I reach the result of my deliberation, I deem it to be of such importance as to merit full statement. Corporate bodies that engage in a public or *quasi* public occupation are created by the state upon the hypothesis that they will be a public benefit. They enjoy privileges that individuals cannot have. Perpetual or certain life is accorded to them. Usually the exercise of the right of eminent domain is dele-

Authority to  
lease when  
opposed to  
public policy.



gated to them, often to be exercised in whatever locality they may be pleased to designate. *National Docks, & N. J. J. C. R. Co. v. United Companies*, 53 N. J. Law, 217, 47 Am. & Eng. R. Cas. 87. The use of the common highways is frequently subordinated to their operations, and, indeed the individual is compelled, even in his own home, to submit, without redress, to discomforts incident to their lawful operation, which he would not be required to tolerate from other sources. *Beseman v. Pennsylvania R. Co.*, 50 N. J. Law, 235, on appeal, 52 N. J. Law, 221. Thus they are given special privileges because of the benefits they are presumed to confer upon communities. Railways afford speedy and comfortable passage to and from divers parts of the country, carry produce of mines, farms, and factories to markets, distribute industries throughout the land, feed the multitudes in populous cities, and accomplish many other beneficent ends. Water, gas, telegraph, and similar corporations also render to the public benefits which readily suggest themselves to the mind as it contemplates their work. While the state confers special privileges upon these favorites, it at the same time exacts from them duties, which also tend to the public welfare. The whole scheme of the laws of their organization is to equip and control them as instruments for the public good. Such corporations hold their powers not merely in trust for the pecuniary profit of their stockholders, but also in trust for the public weal. The impress for public good is stamped upon their very being, and it becomes a duty, which, though not prescribed in express language of the law, is to be implied from the nature of every power conferred. When, therefore, it appears that such a corporation, unmindful of this plain duty, acts prejudicially to the public, in order to make undue gains and profits for its stockholders, it uses its powers in a manner not contemplated by the law which confers them. The use becomes abuse, and is tantamount to excess of power. I appreciate the strength of this argument, but, as I have said, I do not need to affirm it to justify my conclusions, and therefore content myself with the mere statement of it.

Anticipating that I may hold that the act of 1880 is constitutional, and that it gives power to the Central Railroad Company to lease its road and franchises, the attorney general further urges: *First*, that the lease in question is in reality made to a foreign corporation; and, *second*, that such a lease is forbidden by the statute approved May 2, 1885, entitled "An act respecting the leasing of railroads," except under conditions which do not exist.

I agree with him in both these propositions. Equity looks

at the substance, not merely the outward form. The transaction of the 12th of January, 1862, between the three defendants consists, in form, of a lease between two of them, and a guaranty of that lease, coupled with a traffic agreement, to which all three of them are parties. Such is the form. But when the fact that a law which, in its terms, prohibits a lease to a foreign corporation without legislative sanction, is contemplated, and regard is had to the characters and relations of the contracting parties, and to the terms of the instruments they have entered into, and the simultaneous execution of these instruments, a substantial *status*, differing from the form, is disclosed. The statute forbade a lease to the Philadelphia & Reading Railroad Company, a foreign corporation, until a law should be enacted which would approve such a lease, but it did not prohibit a lease to a domestic corporation. The Philadelphia & Reading Railroad Company, through its officers and servants, had promoted the organization of the Port Reading Railroad Company under the general railroad law of this state for the purpose of building and operating a short railway in connection with its system. The capital of that company is \$2,000,000. The road is only 20 miles long. When the lease was made it was but partially constructed. Upon such assets as it then had there existed a mortgage for \$1,500,000, an amount probably in excess of the value of those assets. No one can for a moment believe that the Central Railroad Company of New Jersey would commit its extensive railroad, with its depots, stations, terminals, rolling stock, ferries, and 40 auxiliary roads, in all representing assets valued at nearly \$70,000,000, to the keeping of so irresponsible a lessee, and depend upon it alone for the security of that property and the payment of a rental which for a single year will exceed the value of the lessee's entire property. The mere statement of such a proposition exhibits a business absurdity. The lessee was not only irresponsible under such a trust, but was not in position to afford the Central Railroad even a temporary benefit from alliance with it. Without the sustaining arm of the Philadelphia & Reading Company, a lease to it would not have been thought of. The recitals of the guaranty admit this absurdity by representing that the Central Railroad Company would not lease until the Philadelphia & Reading Company, entering into the same transaction, and as a party thereto, executed the paper called the "guaranty." That paper expressly embodied the lease, and bound the Philadelphia & Reading Railroad Company to the virtual execution of it. The "lease," so called, with the Port Reading

Lease was made to a foreign corporation.

Company was a mere form. The guaranty was the really operative and important paper. Without it the Central Railroad would not be assured of its rental and the traffic that was necessary to make the proposed alliance profitable, for the Port Reading Railroad Company, as a distinct entity, was irresponsible, and without power to assure traffic. But, more than this, the Port Reading Railroad Company is, for all substantial purposes, the Philadelphia & Reading Railroad Company. It is confessedly owned by individuals who represent and serve the Philadelphia & Reading. Its capital stock, save a few shares, has gone, or is to go, to a construction company which unquestionably belongs to the same interest. The construction company is officered by the servants of the Philadelphia & Reading Railroad Company. It has commenced work with an insignificant paid capital—\$2000—and it had confessedly drawn moneys from the Philadelphia & Reading Railroad to enable it to build the Port Reading road. The business offices of both the Port Reading Railroad and the Port Reading Construction Company are identical with the principal office of the Philadelphia & Reading Railroad Company.

A glance at the execution of the guaranty exhibits that the same individuals are president and secretary of both the Port Reading Railroad Company and the Philadelphia & Reading Railroad Company. By official reports, stockholders of the Philadelphia & Reading Railroad Company are informed that the Port Reading Railroad is "their" road, and, in substance, that it is expected to earn an adequate return for "their" investment in it. In the face of such a situation it is idle to say that the Port Reading Railroad Company is not in all things save in its intangible and unsubstantial corporate entity, the Philadelphia & Reading Railroad Company. It is only necessary to state these particulars to satisfy the mind of the justice of this conclusion. "The statement," says Mr. Morawetz in his work on Corporations (section 227), "that a corporation is an artificial entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body. A corporation is really an association of persons, and no judicial *dictum* or legislative enactment can alter this fact." "It is a certain rule," said Lord MANSFIELD in *Johnson v. Smith*, 2 Burrows 962, "that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted." It follows from the conclusion reached that the intervention of the Port Reading Company as nominal lessee is but a device to disguise the real nature of the transaction.

It is demonstrated as clearly as words could state it that the object of the transaction was to place the Central Railroad within the Philadelphia & Reading Railroad system. The Central's reliance was not upon the small, unfinished road, with a comparatively petty capital, and little or no valuable assets, but upon the Philadelphia & Reading Railroad Company, that estimated its assets at \$200,000,000. It is sticking in the bark to say that in this transaction the Philadelphia & Reading Railroad Company is not the real lessee, and that the guaranty executed by it is not the real lease. The misnomer of papers, and the use of a nominal lessee, does not change the substance of the transaction with which this court deals. The situation here may be summed up in the words of Vice Chancellor KINDERSLEY in *Attorney General v. Great Northern R. Co.*, 1 Drew. & S. 157 (6 Jur., N. S., 1006, 29 Law J. Ch. 794): "A more flimsy device, when the particulars are once known, it is impossible to imagine. It may succeed for a time in baffling persons who may have an interest in preventing its being done, and has succeeded; but it was a mere crafty contrivance to evade the requisition of the law on the subject of joint-stock companies."

It must not be thought that courts are powerless to strip off disguises to thwart the purposes of the law. Whenever such disguises in fact appear they can readily be disrobed. The difficulty is in showing the disguises, not in penetrating them when they appear. *Attorney General v. Great Northern R. Co.*, *supra*; *Pennsylvania R. Co. v. Com.* (Pa. Sup.), 29 Am. & Eng. R. Cas. 145; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 29 Am. & Eng. Corp. Cas. 259; *People v. North River Sugar Refining Co.*, 121 N. Y. 582; *State v. Standard Oil Co. (Ohio)*, 36 Am. & Eng. Corp. Cas. 1.

Now what is the effect of the act of 1885? It consists of three sections. The first forbids any railroad corporation to lease its road or franchises to any foreign corporation, or to unite, consolidate, or merge, its stock, property, franchises, or road, with those of a foreign corporation, until the consent of the legislature of this state thereto shall have been obtained. The second prescribes how that consent of the legislature shall be obtained. The language is: "It shall submit a draft of the proposed lease \* \* \* to the legislature of this state, for its consideration, and no such lease \* \* \* shall be of any effect whatever until the same shall have been approved by an act of the legislature passed for that purpose, nor until the corporation or corporations, person or persons, parties to such lease \* \* \* shall

Validity of  
statute re-  
quiring leg-  
islative con-  
sent to rail-  
road lease.

first, and as a condition precedent to the same, file in the office of the secretary of state an agreement, to be approved by the governor and attorney general, surrendering to the state all rights or exemption from taxation," etc. The third section repeals inconsistent legislation. In short, the effect of the act is to withdraw the power to lease, given by the statute of 1880, so far as a lease to a foreign corporation is concerned.

The defendants attack this act by claiming that it contravenes two requirements of the constitution, contained in paragraph 11, § 7, art. 4, one of which is that the legislature shall not pass any private or special law "granting to any corporation, association or individual any exclusive privilege, immunity, or franchise whatever;" and the other of which is that "the legislature shall pass no special act conferring corporate powers." Their argument is that the proposed lease is to be without validity until it shall be approved by an act of the legislature passed for that purpose, and that, as any lease, to be approved, will be replete with conditions, covenants, and terms, which in their very nature are special, and inapplicable to any person, natural or artificial, other than the contracting parties therein, and that any, even a general, act ratifying it must confer a particularly limited power and to some extent exclusive privilege, upon the corporate parties to the lease. If this argument should be applied to a law specially passed to sanction a particular lease, it might be regarded as sound, but as no such law has been passed, it is obvious that its validity cannot be discussed or determined. The law now considered is the act of 1885. That act does not confer either a power or a privilege. Its object is to restrict or condition the exercise of an existing power. The objection urged, then, properly should be that the law of 1885 cannot constitutionally be put in force according to the legislative intent, and to sustain that objection it must appear that an attempt to act under the law will of necessity induce legislation that will be unconstitutional, and therefore void; and the argument will be that, as for that reason no action under the law can be successful, the law is incapable of being performed, and therefore binds not. It is to be observed, however, that the reference to a subsequent legislature is couched in terms that manifestly contemplate a lawful exercise of the lawmaking power. The action is to be by "an act passed for that purpose." The statute attacked, then, contemplates a law to be subsequently made by a power equal to that from which it sprang. It cannot dictate the terms of such subsequent law. When it prescribed that action should be by law, it surrendered power over the action. I

must assume that the statute questioned was enacted in the light of this fundamental principle, for the lawmakers are entitled to every presumption in favor of their knowledge and wisdom. Cooley, Const. Lim. 219. Viewed in this light, the legislative purpose appears to have been, not to inaugurate a permanently prohibitory policy concerning leases to foreign corporations, but to forbid them, until they should have legislative sanction. Having no power over subsequent legislation, the law could not prescribe that that sanction shall be given in special terms, nor does it intend to so prescribe. Its purpose is to lead the proceeding for sanction to a point where its power must cease, and there surrender it. It in effect prescribes that railroad corporations of this state shall not lease to foreign corporations without the sanction of law, to be hereafter enacted; that it is not the policy of the law to permanently prohibit such a lease, but it does now prohibit it and will prohibit it until hereafter a law to be enacted shall permit it; until a future law shall, in the light of the terms desired, prescribe terms under which it may be made. That such uncontrolled future law need not be special is too plainly apparent to require discussion. The law of 1885, then, is constitutional, and is applicable to the lease now questioned; and it follows that the lease was made not only without legal sanction, but in defiance of an expressly prohibitory statute.

The next inquiry is whether the attorney general may invoke the power of this court to restrain further operations under and in pursuance of the lease. It is well settled that, where a corporate excess of power tends to the public injury, or to defeat public policy it may be restrained in equity at his suit. In *Attorney General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 631, 633, in pronouncing the opinion of the court of errors and appeals, Mr. Justice DIXON said: "In equity, as in the law court, the attorney general has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit by what may be called 'civil information,' for their protection. The state is not left without redress in its own courts, because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility, and to whom, therefore, it has given the right of appearing in its behalf, and invoking the judgment of the court on such questions of public moment." Prof. Pomeroy, in section 1093 of his work on *Equity Jurisprudence*, states the rule in this language: "When the managing body are doing, or are about to do, an *ultra vires* act of

Right of  
attorney  
general to  
institute  
proceedings.

such a nature as to produce public mischief, the attorney-general, as the representative of the public and of the government, may maintain an equitable suit for preventive relief." It appears that the attorney general has the election in his discretion whether, in case of excess of corporate powers, he will proceed at law to forfeit the charter and franchises or apply in equity for a restraint of the excess. Both tribunals are open to him. The right of appeal to equity does not depend upon the inadequacy of the legal remedy. This subject is stated by Chief Justice RYAN, in *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 524, in this way: "The equitable jurisdiction precludes the objection that there is an adequate remedy at law. It admits the remedy at law, but administers its own remedy in preference, when the state seeks it in preference. It seems to proceed on the presumption that it may better serve the public interest to restrain a corporation than to permit it by penal remedies, or to forfeit its charter; and that, in that view, the proper officers of the state should have an election of remedies. And we may as well say in this connection that the jurisdiction to entertain these informations is wholly independent of an adequate remedy at law; and that, were that otherwise, we could not consider the informations in the nature of a *quo warranto*, pending in this court against these defendants, as an adequate remedy at law, which could be a substitute for or bar to the injunction asked. Judgments of ouster on those informations might not only be of far more grave consequence to the defendants, but might be far less beneficial to the state, and less accordant with its policy, and altogether less equitable and proper, than the injunction sought to restrain the defendants from doing what is alleged to work a forfeiture of their charters."

There has been some disagreement among the cases as to whether an injunction will issue at the instance of the attorney general to restrain every excess of corporate power, or whether, before it issues, actual threatened injury must be manifest. The argument which sustains the first class of cases is that every excess of corporate power violates the contract with government and thereby invades public and governmental rights. The law deems such invasion to be a public injury. An apt illustration is to be found in the case of *Thomas v. West Jersey R. Co.*, 101 U. S. 71, where there was an unauthorized lease of a railroad. The supreme court of the United States there held that the franchises and power granted to a railway company are designed to be exercised by it for the public good, and this purpose enters

Injunction to  
restrain  
excess of  
corporate  
power.

into the consideration for the grant. Any contract, therefore, by which the corporation disables itself to perform those duties to the public, or attempts to absolve itself from their obligation, without the consent of the state, is a violation of its contract with the state, and tends to the public injury. The argument to sustain the other class of cases is that a court of equity should not move upon a mere legal intendment, but should be satisfied of a real, substantial public injury, which demands the writ of injunction in the due protection of the public. In the use, at least of a preliminary injunction, the latter class of cases appears to be the better founded in fitness and reason; for if there be no present emergency to be met, why may not the injunction be reserved until final hearing? The authorities upon this subject are numerous. The following, among them, appear to me to best exhibit the contrariety of opinion that I have stated: *Green's Brice's Ultra Vires* (2d Ed.) 708; *Attorney General v. Shrewsbury Bridge Co.*, 21 Ch. Div. 752; *Attorney General v. Cockermouth Local Board*, L. R., 18 Eq. Cas. 172; *Attorney General v. Great Eastern R. Co.* 11 Ch. Div. 449; *Attorney General v. Great Northern R. Co.* 1 Drew & S. 154, 6 Jur. N. S. 1006; *Attorney General v. Railroad Cos.*, 35 Wis. 525. The last cited case collects almost all the authorities upon this subject.

But the exhibition of the tendency of the lease in question to public injury does not rest alone upon mere legal intendment; and I may here apply the rule, with the limitation incorporated in it, that the tendency to public injury must in fact appear. There are peculiar features in the transaction now considered that evince a public danger much more serious than appears in the mere transfer of corporate duties to performance by a foreign corporation. The real lessor and lessee here are extensive producers and carriers of anthracite coal. They constitute two of the six great anthracite coal carriers from the coal regions of Pennsylvania to this and adjoining states. It is disclosed that the real lessee has secured a lease of the Lehigh Valley Railroad Company, and that thereby, and by the lease in question, it controls three of the six great coal carriers referred to; and also that the alliance thus formed now controls, through the instrumentality of coal companies, the capital stock of which these combined carriers own, more than one-half of all the anthracite coal fields in Pennsylvania. Moreover, as an indication of the tendency of the combination, the attorney general presents a report by the lessor defendant to its stockholders, in which it congratulates them upon an alliance which, with

**Tendency of  
lease to public  
injury—  
Monopoly in  
coal.**



the co-operation of other large coal-producing companies, will insure them "greater uniformity in prices of coal," and the "avoidance of needless and expensive competition between producers." He urges that, in substance, this report declares the reaching out to a monopoly which will work inestimable disaster to the people of this state. And as a further evidence that monopoly is in view, he points also to an admission by the president of the Philadelphia & Reading Railroad Company that the lease complained of will possibly facilitate the co-operation of other coal producers, and, in itself, undoubtedly affect prices of coal in some localities. The proofs show that there are localities in this state which formerly had the advantage of competition between these allied roads, but now are subject to the monopoly which this lease affords. It is true, co-operation of the remaining coal roads, which is necessary to a complete monopoly, has not yet been secured. By this lease only one competitor is silenced, and only a little more than one-half of the entire coal region is controlled. It is only the second step in the direction of monopoly, the first being the lease of the Lehigh Valley Railroad. It is to be remembered, however, that the attorney general may have his injunction when the *ultra vires* act tends, or is of a nature, to produce public injury. He is not required to wait until all the monopoly possible is created, or until all the injury possible is in process of infliction.

The present situation may be justly regarded as Vice Chancellor KINDERSLEY considered that which was presented to him in Attorney General v. Great Northern Ry. Co., *supra*, where the *ultra vires* act was the mere dealing in coal by a railway company. He comments upon it as follows: "Mr. Rolt argued well; but there is no danger of monopoly, because, even if you were to suppose that this company got the entire command of all the coal which comes down that line from the inland districts and the northern part of England, that is not monopoly. There is all the coal that comes from the northwestern district, the Lancashire district, and all the coal from the Welsh district, Bristol coal, and so on; and there is no monopoly. But follow that out, and suppose this company has got the command of all the coal on its line, and from that part of the country from which it starts, and suppose that the London & Northwestern has got the control of all the Lancashire and northwestern coal country, and suppose the Great Western has got the command of all the Welsh and Bristol coal fields, you have got then the whole traffic in coal which is to supply the metropolis and the country in the hands of

three companies. Are not the interests of the public most deeply concerned in preventing that? Is it not obvious that the interests of the public must suffer if that state of things is allowed to arise? And yet what this company is doing may just as well be done by each of the other companies I have mentioned; and the result would be, in effect, not a monopoly of one company, but a monopoly of three or four, or five companies, and a monopoly most prejudicial."

But the answers deny that either the Philadelphia & Reading Company or the Central Company own any coal lands, or produce or deal in coal. That is true, but at the same time it is admitted that the Philadelphia and Reading Company owns a majority of the capital stock of the Reading Coal & Iron Company, and that the Central Company owns the majority of the capital stock of the Lehigh & Wilkesbarre Coal Company, and that these two coal companies own or possess the coal land referred to as belonging to their owners. What is this but disguise and evasion? Whatever may be the nominal ownership or the legal title, for the substantial purposes of the injury apprehended and the attorney general's complaint, the railroad companies stand as the owners of the coal lands in this court. That the fiction which excuses the denials of the answers is mere form is emphasized by the language of the president of the Philadelphia & Reading Company when, in one of his reports to its stockholders, he speaks of competitors, and adds: "Who, with yourselves, are engaged in producing a commodity far in excess of the demand of the markets; but the proportion of business allotted to this company in years past, when its financial straits and lack of facilities did not permit it to mine and distribute its proportion of the increased tonnage," etc., and when he refers to the Port Reading Railway as supplying the means of putting the product of "your mines" upon the market; and when he reports to the same stockholders in this language: "It will not do to expect immediate returns for 'your large holdings of unproductive coal lands.' These, in good time, will reach a value equal to the entire capital debt of your company. But what is needed now is the practical development of so much of these lands as are needed to supply the demand for anthracite coal." And also by the report of the president of the Central Railroad Company to its stockholders, to which I have already referred, in which he says: "It is fair to expect, as the further results of this alliance, with the co-operation of other large coal-producing companies, greater uniformity in the price of coal," etc. So, also, the testimony of the president of the Philadelphia & Reading Company abounds

in admissions of railroad ownership of the coal lands. The answers are literally true, but their denials in this respect, without explanation, and in the face of the facts adverted to, savor of an evasion which disentitles them to that force which is usually accorded to the denials of responsive answers upon such a preliminary hearing as this.

Here, then, we have great coal dealers, complaining that they are not sufficiently paid for the produce of their mines, combining, so that already they control more than one-half of the coal-fields upon which this state depends for fuel, and looking to the co-operation of the remaining anthracite coal producers to effect a change in the price of their output, so that they may have more satisfactory returns from their investment. To say that these conditions do not tend to a disastrous monopoly in coal would be an insult to intelligence. It is possible that such a monopoly may be used, as the defendants suggest, to introduce economies, and cheapen coal; but it does violence to our knowledge of human nature to expect such a result. Upon such a possibility I quote again the language of Vice Chancellor KINDERLEY in the case of the Great Northern Railway Company. He says: "It is said: Well, but according to the statement of the bill and affidavits, so far from that being prejudicial to the public, it is most beneficial. For see what is the result; coal is made cheaper. Yes, coal is made cheaper temporarily; but are we to suppose that this company, or any company—for I confess I have no faith in the morality of any joint stock company—that this company or any other company—especially this company, which has contrived such a cunning device to conceal its proceedings—will merely consider the interests of the public, and supply the public with cheap coal? What is the object of a joint stock company? To make as much money as possible to divide among shareholders. The result, if this proceeding goes on, with this company and other companies must be most grievously to the detriment of the public." Treating this same suggestion in *State v. Standard Oil Co.* (Ohio), 36 Am. & Eng. Corp. Cas. 1, Judge MINSHALL says: "It may be true that it has improved the quality and cheapened the cost of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard not what may, but what usually happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are

defended, and is well answered in *Richardson v. Buhl*, 77 Mich. 632, 27 Am. & Eng. Corp. Cas. 256. After commenting on the tendency of the combination known as the 'Diamond Match Company' to prevent fair competition and to control prices, CHAMPLIN, J., said: 'It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company, at any time, to raise the price to an exorbitant degree.' The commodity in which these companies deal is a necessary of life in this state. It is the principal fuel of its homes and factories. The slightest increase in its price is felt by a population of hundreds of thousands of persons, for their necessity compels them to pay that increase. If once a complete monopoly be established by the destruction of competition, whether that be through lease or by co-operation, the promoters of it and sharers in it may have whatever price their cupidity suggests. The disaster which will follow cannot be measured. It will permeate the entire community—furnaces, forges, factories, and homes,—leaving in its trail murmurs of discontent with a government which will tolerate it, and all the other evil effects of oppression. Enough has been said to exhibit that the *ultra vires* act complained of portends the greatest danger to the public welfare, and that the case is clearly one in which the attorney general may and should ask the assistance of this court.

My conclusions upon the points stated preclude the necessity of my passing upon many other matters that were discussed at the argument. Among them is the question whether the Central Company has power to lease its forty and more auxiliary roads, many of which it holds by lease or the ownership of the majority of stock; and also the very important question as to the power of the Central Company, under its charter and subsequent legislation, to invest its capital in coal lands, or in the stock of a coal company; also questions presented in a wider discussion of the subjects of monopolies, competition, and restraint of trade than it has been necessary for me to venture upon. Perhaps the prayer of the information and the motion for injunction thereon would now justify an entrance upon the discussion of these latter topics; but as I conceive that the relief I have concluded to afford at this time is all that the public necessity will demand until all the proofs may be regularly taken, and the case may be finally and more deliberately heard, I refrain from it.

It remains only to define the bounds of the injunction to

which the attorney general is now entitled. This is a preliminary application, heard upon information, answers, and *ex parte* proofs. Its object is to do no more than to prevent a threatened, irreparable injury until the cause can be finally heard, and it should go no further in disturbance of the existing situation than the effectual prevention of the injury apprehended will admit. But the danger is serious. I do not perceive how I can effectually prevent it in any other way than by forbidding all operations under the lease and tripartite agreement, and also the performance of the covenants that those instruments contain. To merely continue the stay that has been granted, and leave the Philadelphia & Reading Railroad Company in possession and operation of the property and franchises of the Central Company, would be to facilitate and invite infraction of the order already made. The devices for disguise which have appeared in this case as attributable to the defendants admonish me to sever, as far as possible, the connection between them until the final hearing. I will therefore continue the present injunction to final hearing, adding to it, however, the further direction that the defendants, and each of them, their officers and agents, do desist and refrain from further performing and carrying into effect the lease and tripartite agreement, and that the Port Reading Railroad Company and the Philadelphia & Reading Railroad Company do desist and refrain from continuing to control the road, property, and franchises of the Central Railroad Company of New Jersey, and from further in any wise intermeddling therewith; and that the Central Railroad Company of New Jersey do desist and refrain from permitting the Port Reading Railroad Company or the Philadelphia & Reading Railroad Company to use, control, or operate its road, property, and franchises; and that the Central Railroad Company do again resume control of all its property and franchises, and performance of all its corporate duties.

**Power of Railroad Company to Lease its Property and Franchises.**—See note, 32 Am. & Eng. R. Cas. 409; note, 16 Am. & Eng. R. Cas. 512; Central Transportation Co. v. Pullman Palace Car Co. (U. S.) 45 Am. & Eng. R. Cas. 607; Memphis & C. R. Co. v. Grayson (Ala.), 43 Am. & Eng. R. Cas. 681, note 687.

**Law of Monopolies—Combinations to Prevent Competition.**—See Elkins v. Camden & A. R. Co. (N. J.), 9 Am. & Eng. R. Cas. 590, note 595; State v. Standard Oil Co. (Ohio), 36 Am. & Eng. Corp. Cas. 1, note 29.

**Excess of Corporate Powers—Authority of Attorney General to Bring Suit.**—See State v. Farmers' Loan & Trust Co. (Tex.) 50 Am. & Eng. R. Cas. 683, note 699.

**Sufficiency of Title of Legislative Acts Concerning Railroads.**—It is a well settled principle of constitutional law that the common constitutional provision that the object and contents of a statute shall be expressed in the

title is not to be too literally construed. The meaning of this constitutional requirement is that the title and acts must correspond, not literally, but substantially; and this correspondence is to be determined in view of the subject matter to which the legislation relates. *Macon & Birmingham R. Co. v. Stamps*, 85 Ga. 1, 43 Am. & Eng. R. Cas. 318. Thus, where the title of an act indicated that a railroad was to run into and through a named town, and the body of the act provided for running it into and through the corporate limits, or within one mile of the court house, on certain conditions, the title covers the matter of the enactment. *Macon & Birmingham R. Co. v. Stamps*, 85 Ga. 1, 43 Am. & Eng. R. Cas. 318. And an act entitled "An act to authorize the incorporation of companies for the construction of union railway stations and depots with the necessary tracks and management of the same," is sufficient to warrant the conferring of the power of eminent domain upon such corporations. *Fort Street Union Depot Co. v. Morton*, 83 Mich. 265, 47 Am. & Eng. R. Cas. 41. And the provision of the Mich. Union Depot Act, which authorizes companies organized thereunder to run local trains is warranted by the provision in the title of such act authorizing the construction of depots "with the necessary tracks and the management of the same." *Fort Street Union Depot Co. v. Morton*, 83 Mich. 265, 47 Am. & Eng. R. Cas. 41. An act making railroads liable for work performed and materials furnished in the construction or repair of the road was held not to be unconstitutional on the ground that the bill contained more than one subject not embraced in the title. *Kansas City & O. R. Co. v. Frey*, 30 Neb. 790. The Michigan Act of 1855, relating to "Train Railway Companies" was amended in 1861, 1867 and 1871, by acts authorizing and regulating the operation of such railroads for the carriage of passengers through the streets of cities under municipal regulation. The amendment of 1867 authorized the use of steam or any other power than animal power under the authority of the municipality. *Held*, that it cannot be said that the act is unconstitutional as embracing more than one subject which is not expressed in its title. *Detroit City R. Co. v. Mills*, 85 Mich. 634, 46 Am. & Eng. R. Cas. 608.

The provision of the Virginia Act of March 21, 1877, entitled "An act to secure the payment of wages or salaries to certain employes of railway, steamboat and other corporations, and of the act of April 2, 1879, entitled "An act to amend and re-enact the first and second sections of an act approved March 21, 1877, entitled," etc., which declares that persons furnishing cars and engines to any railroad company shall have a prior lien on the franchise, etc., is unconstitutional and invalid under the constitutional provision which declares that "no law shall embrace more than one subject which shall be expressed in its title." *Fidelity Insurance, Trust & Safe Deposit Co. v. Shenandoah Valley R. Co.*, 86 Va. 1, 38 Am. & Eng. R. Cas. 559. The Georgia Act of October 27, 1887, entitled "An act to amend section 2971 of the Code of 1882 (being a codification of acts of 1850 and 1855) as amended by the act approved December 16, 1878," which extends in certain contingencies, to parents and husbands the right of action for homicide conferred by the original act upon widows and children, and defines the term "full value of the life of the deceased, is not unconstitutional as containing more than one subject matter which is not expressed in its title. *Clay v. Central R. & B. Co.*, 84 Ga. 345, 42 Am. & Eng. R. Cas. 76. A provision authorizing consolidated railroad companies to issue bonds and to secure the same by mortgage, and a proviso declaring that no consolidated company shall have power to create any mortgage or other lien which shall be valid against judgments for timber furnished, work or labor done, or for damages to person and property, are germane to the subject of an act entitled "An act to amend the law in relation to the

consolidation of railway companies." *Frazier v. East Tennessee V. & G. R. Co.*, 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358. Where the title of an act is "An act to provide for the incorporation of railroad companies" a provision therein for the individual liability of stockholders in such companies as may be organized under the law is "matter properly connected therewith," and the act embraces but one subject which is expressed in the title, within the meaning of the constitutional provision. *Shipley v. City of Terre Haute*, 74 Ind. 297, 4 Am. & Eng. R. Cas. 345. Where the subject expressed in the title of a statute is the provision of "a means for the collection of claims for cattle and other stock destroyed by railroad," and the body of the statute declares or creates an absolute liability which did not exist prior to its passage, such new liability is not within the subject expressed in the title, and to this extent the statute is inoperative under section 14 of article 4 of the Florida Constitution. *Savannah, F. & W. R. Co. v. Geiger*, 21 Fla. 669, 29 Am. & Eng. R. Cas. 274. A statute providing that the guards at farm crossings shall, in the absence of an agreement or contract to the contrary, be constructed, maintained and kept closed by the owner of the farm crossing, may be competently inserted in a statute entitled "An act requiring railroad corporations and other persons operating and controlling lands to fence their right of way or railroad track, and to construct barriers and cattle guards at certain public roads and highway crossings and keep the same in repair, prescribing remedies and penalties for failure to do so." *Hunt v. Lake Shore & M. C. R. Co.*, 112 Ind. 69, 35 Am. & Eng. R. Cas. 176. An act entitled "An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this state," is not unconstitutional, on the ground that the title provides for more than one object, its object being to bring together the legislation concerning the creation and management of railroads. *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378. An act entitled "An act to amend the charter of the C. & St. L. R. Co.," may embrace provisions legalizing certain invalid municipal elections previously held for the purpose of voting subscriptions to railway stock. *Jonesboro v. Cairo & St. L. R. Co.*, 110 U. S. 192, 15 Am. & Eng. R. Cas. 615. The fourth section of the Ill. Act approved March 4, 1869, entitled "An act to incorporate the Dixon & Quincy R. R. Co.," assumed to confer on townships power to subscribe to the capital stock of or to make donations to said company, and provided for elections to decide as to such subscriptions or donations, for taxation for the payment of the same if voted, and for the issue of bonds to represent the same, etc. It was held that section did not cover and embrace a subject not expressed in the title of the act. *Town of Abbingdon v. Cabeen*, 106 Ill. 200, 12 Am. & Eng. R. Cas. 581. The powers, however valid and extended which a new township may exercise constitute but one object which is fairly expressed by a title showing nothing more than the legislative purpose to establish such township, and such statute may constitutionally authorize a town to subscribe to the stock of the railroad company, and to issue bonds therefor and to levy taxes to pay for the same. *Township of Montclair v. Ramsdell*, 107 U. S. 147, 12 Am. & Eng. R. Cas. 689. A section providing for the giving of danger signals, and for the equipment of railroad cars, is embraced in the title of an ordinance entitled "An ordinance to regulate the speed within the city limits of cars and locomotives propelled by steam." *Bergman v. St. Louis, I. M. & S. R. Co.*, 88 Mo. 678; 28 Am. & Eng. R. Cas. 588.

And see further as to the *Sufficiency of the Title of an Act of the Legislature*, note, 12 Am. & Eng. R. Cas. 585; note, 5 Am. & Eng. R. Cas. 387.

## INTERSTATE COMMERCE COMMISSION

v.

## TEXAS &amp; PACIFIC R. CO.

*(U. S. Circuit Court, S. D. New York, October 5, 1892.)*

**Interstate Commerce Act—Order of Commission—Connecting Lines.**—If a railroad company is violating a proper order of the Interstate Commerce Commission, it cannot escape being restrained from doing so upon the ground that a connecting carrier, participating with it in the wrong doing, is not proceeded against.

**Same—Discrimination in Rates—Competing Lines.**—A carrier cannot justify a discrimination in rates in violation of the Interstate Commerce Act (in this case the carrying of imported traffic shipped from foreign ports upon through bills of lading at lower rates than inland traffic) merely upon the ground that unless it is given the traffic thus obtained it would go to a competing carrier.

*Edward Mitchell*, U. S. District Attorney, *Simon Sterne* and *John D. Kernan*, for Commission.

*John F. Dillon* and *Winslow S. Pierce*, for defendant.

WALLACE, J. —This is an application to enforce an order of the interstate commerce commission, made January 29th, 1891, in a proceeding instituted by the New York Board of Trade and Transportation. Case stated. The petition in that proceeding complained of unjust discrimination made by various railway carriers. The defendant was duly notified of the complaint and appeared in the proceedings and submitted its rights. It was shown to the commission, as appeared by the findings of fact in their report, that the defendant, in conjunction with the Southern Pacific Company, made joint rates from New Orleans to San Francisco covering carriage of traffic by the rails of the defendant from New Orleans to El Paso and thence by the rails of the Southern Pacific Company to San Francisco; and also made joint rates with vessel owners in London and Liverpool covering carriage of traffic from those places to San Francisco *via* New Orleans. It was also shown that the ordinary tariff rates charged by the two companies upon traffic delivered to the defendant at New Orleans and shipped at New York, Chicago and other places in this country for carriage from New Orleans to San Francisco, were somewhat more than double the rates charged for carriage of similar traffic sent from Liverpool or London by through bill of lading to San Francisco *via* New Orleans.

51 A. & E. R. Cas.—3.



To illustrate, it was shown that the rates made by the two companies, in conjunction with Liverpool vessel owners, by through bills of lading from Liverpool to San Francisco by the rails of the defendant from New Orleans to El Paso, were per hundred pounds on books, on carpets and on cutlery \$1.07, while the regular tariff rates of the two companies upon the articles when sent to New Orleans from other places in this country per hundred pounds on books \$2.04, on carpets \$2.88, and on cutlery \$3.26, and that the rates on these articles when shipped from Liverpool were 80 cents per hundred pounds for carriage from New Orleans to San Francisco. The defendant contended that it was justified in making the discrimination between the foreign and domestic traffic because owing to the competition of sailing vessels and foreign carriers between Liverpool and San Francisco it could not get any appreciable amount of foreign traffic without meeting the competitive rates by making the rates given. The commission while stating the facts to be as asserted by the defendant ruled against the validity of the excuse and made an order which in substance required the defendant to desist from carrying any article of imported traffic shipped from any foreign port upon through bills of lading destined to any place within the United States at any other than the same rates established by the inland tariff of the defendant for the carriage of other like kind of traffic. It is admitted by the answer of the defendant that since the order of the commission was made it has maintained a substantially similar disparity in its transportation rates for these articles as well as in those for the transportation of numerous other articles depending upon the foreign or domestic origin of the shipment. The defendant insists that its action in this regard is not prohibited by the provisions of the Interstate Commerce Act, and that as it has not been guilty of any unjust discrimination within the meaning of that act, the order of the commission ought not to be enforced. It also insists that the proceeding is defective because the Southern Pacific Company is not made a party to the defense.

If the order made by the commission was a lawful one I see no reason why the defendant should not be compelled to obey it, notwithstanding the Southern Pacific Railway Company is not at present pursued. If the defendant is violating a proper order of the commission it should be restrained from doing so and it cannot escape upon the objection that another wrong-doer is also violating it. The real question, as it seems to me, is whether the existence of the peculiar facts which were relied upon before the commission by the defendant, as an excuse for this discrimination, justifies its conduct.

Effect of  
failure to  
proceed  
against  
So. Pac.

It must be conceded as true, for the purpose of the present case, that the rates for the transportation of traffic from Liverpool and London to San Francisco are in effect fixed and controlled by the competition of sailing vessels between those ports and also by the competition of steamships and sailing vessels in connection with railroads across the Isthmus of Panama, none of which are in any respect subject to the Act to Regulate Commerce. It must also be conceded that the favorable rates given to the foreign traffic are, for reasons to which it is now unnecessary to revert, somewhat remunerative to the defendant; and it must also be conceded that the defendant would lose the foreign traffic by reason of the competition referred to and the revenue derived therefrom unless it carries it at the lower rates and by doing so is enabled to get a part of it which would otherwise go from London and Liverpool to San Francisco around the Horn or by the Isthmus of Panama. The case presents a question of much interest and importance to the defendant and carriers similarly situated, and also to our own merchants and manufacturers who in supplying the wants of consumers at places within the United States, have to meet the competition of foreign merchants and manufacturers and are placed at a serious disadvantage if they are compelled by the railway carriers to pay higher rates of transportation upon their goods. The question does not, however, seem to be such a doubtful one as to require more than a brief statement of the conclusions reached. The second section of the Interstate Commerce Act prohibits unjust discrimination and declares that the common carrier charging a greater or less compensation for any services rendered in the transportation of passengers or property than it charges any other person for doing a like and contemporaneous service in the transportation of a "like kind of traffic under substantially similar circumstances and conditions," shall be deemed guilty of unjust discrimination. The third section provides that it shall be unlawful for the carrier to make or give any undue or unreasonable preference or advantage to any particular description of traffic in any respect whatsoever, or to subject any particular person or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The third section is substantially taken from the second section of the English Act of Parliament known as the Railway and Canal Traffic Act of 1854.

Discrimination in favor of foreign traffic is illegal.

Either section is sufficiently comprehensive in its terms to prohibit an interstate carrier from making an unfair discrimination between different shipments in charges for a like and

contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. But neither section is intended to prohibit all discriminations or preferences. In considering whether an undue discrimination has been made, the fair interests of the carrier are to be taken into account, and although lower rates are given to one shipper or class of shippers than to another for carrying the same kind of traffic the latter have no just ground of complaint of discrimination if the advantages of the service enable the carrier to take the traffic of the former at a less cost; nor is the discrimination unjust if made conformably to some agreement by which the favored shipper gives the carrier an adequate consideration for the reduced rates. Upon this principle it was decided not to be an unjust preference under the English Act for a railway company to carry at a lower rate, in consideration of a guarantee of large quantities and full train loads at regular periods, provided the real object of the company was to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect might be to exclude from the lower rate these shippers who could not give such guarantee. *Nicholson v. Great Western R. Co.*, 4 C. B. (N. S.) 366. The discrimination between different shippers is a lawful one if it is such as the carrier may fairly give because of the difference in cost, expense or the exceptional character of the service. *U. S. v. Delaware L. & W. R. Co.*, 40 Fed. Rep. 109, 40 Am. & Eng. R. Cas. 36.

Prior to the enactment of the Interstate Commerce Act the courts were of the opinion that discriminations by railway carriers in the rates of freight charged to shippers based solely on the ground of the quantity of the freight shipped, without reference to any advantages, tending to decrease the cost of transportation, were contrary to sound public policy and inconsistent with the obligations of such carriers to the public. *Hays v. Pa. Co.*, 12 Fed. Rep. 309, 6 Am. & Eng. R. Cas. 594; *Burlington Co. v. Northwestern Fuel Co.*, 31 Fed. Rep. 652.

It might well be that shippers would be induced to increase their traffic with a carrier by the offer of such discrimination, perhaps by withdrawing part of it from a rival carrier, perhaps by stimulating the shipper to enlarge his business operations and thus the discrimination might be profitable to the carrier. The English Courts, in cases arising under the English Traffic Act, have held that preferences given to particular shippers to induce them not to divert traffic from the carrier or to induce them to transfer traffic to one carrier which otherwise would go to another, are unlawful

and cannot be justified on the ground of profit to the carrier allowing them. *Harris v. Cockermouth & W. R. Co.*, 3 C. B. (N. S.), 693; *Evershed v. The London & N. W. R. Co.*, 2 L. R., 3 B. 254.

In the first of these cases the judges in the opinion pointed out that if they were to justify a discrimination upon such reasons a railway company might in any case grant a preference to one person over another, provided it acted *bona fide* in the belief that such a course would be to its advantage. In the second case the court in pronouncing against the validity of the justification used this language:

"We think that a railway company cannot, merely for the sake of increasing their traffic, reduce their rates in favor of individual customers, unless at all events there is a sufficient consideration for the reduction which shall lessen the cost to the company of the conveyance of their traffic or some other equivalent or other services are rendered to them by such individual in relation to such traffic."

The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that unless it is given the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them unless given exceptional rates to justify that one in making the discrimination in his favor on the ground of the necessity of the situation.

The order is granted.

**Discrimination in Rates—Undue Preference—Effect of Competition.**—The above case would seem to be not entirely in harmony with the recent decision of the English Court of Appeal in *Phipps v. London & N. W. R. Co.*, 50 Am. & Eng. R. Cas. 494, where it was held that the fact that a trader has access to a competing route for the carriage of his goods may be taken into consideration by the Railway Commissioners or the court in deciding whether lower tolls or rates charged to such trader by a railway company constitute an undue preference within the meaning of the Railway and Canal Traffic Acts, 1854 and 1888. See also the case of *Liverpool Corn Trade Assoc. v. London & N. W. R. Co.* (Eng.), 45 Am. & Eng. R. Cas. 216, and cases cited in note, 234.

QUINCY, MISSOURI & PACIFIC R. CO. *et al.**v.*HUMPHREYS *et al.*

(145 U. S. 28.)

**Receiver—Appointment upon Petition by Railroad Company—Protection of Vested Liens.**—When a railroad company is insolvent, its preferential indebtedness large, its credit gone and its property liable to be seized by different courts, its assets dissipated and its system disrupted, a court of equity, upon petition by the company, setting forth these facts may appoint a receiver to take charge of the property. But the company cannot thus on its own petition displace vested liens by unsecured claims and the court must require that the property shall be held by the receiver for the benefit of all concerned therein.

**Same—Operation of Leased Road—Rentals as a Lien on Earnings of General System.**—The receiver appointed took possession of a line which had been leased to the insolvent company and operated it for a certain time, keeping its accounts separate however, and applying none of its earnings for the benefit of the general system. The court in appointing the receiver expressly recognized the right of the lessor to take possession on making proper application therefor. *Held*, that the receiver did not become the assignee of the lease or adopt it so as to render the agreed rentals a lien on the earnings of the general system superior to the rights of the general mortgagees.

**Same—Same—Diverted Earnings—Expense of Receiver's Administration.**—It appearing that the net earnings of the general system were but a small fraction of the preferential indebtedness, the payment of the rental could not be set up as an equitable claim on the theory of diverted earnings as previously announced by the court. Nor was the rental entitled to priority over the mortgage liens as being an expense originating in the course of the receiver's administration. *Fosdick v. Schall*, 99 U. S. 241, *distinguished*.

APPEAL from U. S. Circuit Court for eastern district of Missouri.

The Quincy, Missouri & Pacific Railroad Company of Missouri owned in 1879 about 77 miles of road extending westward from West Quincy towards the Missouri river; had issued mortgage bonds to the amount of \$2,000,000; and owed, in addition to the principal of said bonds, a large amount of overdue interest accrued thereon. By an indenture made August 21, 1879, the railroad of this company was leased to the Wabash Railway Company for a period of 99 years, with the option to the lessee to renew the same perpetually. By the terms of this contract a majority of the common stock of the Quincy Company was to be transferred to the Wabash Company, so as to give the latter control of the former, and

a majority of directors in its board was to be elected in the interest of the Wabash Company. The Wabash Company was to supply \$125,000 to the Quincy Company to enable it to complete the construction of its road to Milan, to a connection with the line of the Burlington & Southwestern Railroad, and was itself authorized to extend the road from Milan to its contemplated terminus at Brownville, on the Nebraska state line. A new mortgage was to be made, covering all the property of the Quincy Company, and securing bonds at the rate of \$9,000 per mile, which was to be used in retiring the bonds then outstanding, and providing for future construction. Preferred stock of the Quincy Company was also to be issued and used in connection with the new bonds to liquidate its outstanding indebtedness, then estimated to be about \$600,000.

The Wabash Company agreed to set aside certain percentages of the gross earnings derived from the operation of the Quincy Company's road, and to apply these percentages—*First*, to the payment of interest on the new bonds; and, *second*, of dividends on the stock. The company guaranteed to pay interest on the bonds in the event that the said percentage of gross earnings should be insufficient for that purpose; to maintain and operate the railroad of the Quincy Company, keeping the same in good condition and repair for the full term of the lease; and to pay all taxes.

It was further provided that, if the principal of the bonds secured by the mortgage should become due in consequence of default in the payment of interest, the Quincy Company should have the option to forfeit the lease, and reenter without process of law.

Under date of October 1, 1879, a mortgage was made by the Quincy Company to Humphreys and Browning as trustees, whereby all its property, including leases and leasehold interests, was conveyed to the trustees to secure the payment of bonds to be issued at the rate of \$9,000 per mile, and the mortgage provided that a default of six months in the payment of interest might be availed of by the bondholders as a cause for declaring all the bonds forthwith due.

November 10, 1879, the Wabash Company was consolidated with other railroad companies, the consolidation forming the Wabash, St. Louis & Pacific Railway Company. This company received possession of the railway of the Quincy Company on July 1, 1880, and by the 1st of July, 1881, had extended the road from Milan to Trenton, a distance of about 31 miles.

On the 27th of May, 1884, the Wabash, St. Louis & Pacific Railway Company filed its bill in equity in the circuit court

of the United States for the eastern district of Missouri, stating that it was insolvent; that it had accumulated a floating debt for its maintenance of \$4,784,145; that it was about to make default in interest payments; that such default would be ruinous to all parties interested in its maintenance and its revenues; and that the interest of all the creditors and bondholders would be thereby imperiled.

The bill made various persons and corporations parties defendant having interests in the lines of the Wabash Company as lessors, mortgagors, or trustees under deeds of trust covering the lines or portions thereof, including the Central Trust Company and Cheney, trustees in a general mortgage, the trustee in a collateral trust mortgage, the Quincy Company, and others; and prayed the court to appoint successors to trustees deceased, or to make such other order with respect thereto as would cause the respective trusts to be properly represented in the matters of the litigation; and to require the defendants to set up their several interests, so that the same might be fully represented.

The bill alleged that by their terms nearly all, if not quite all, the mortgages and trust deeds, whether executed by complainant or other companies on any portions of the line prior to the time when complainant acquired the same, not only embraced the roads and tangible property of the companies executing the instruments, but also the revenues and incomes to be derived from the use of the parts of the roads so mortgaged; that the bondholders had always insisted upon their right to look to the revenues of the sections of the road upon which their mortgages rested as a means of paying and discharging their bonds; that all, or nearly all, of the mortgages embraced all rolling stock to be thereafter acquired by the companies executing the mortgages; but, as the lines of the original companies had been absorbed into complainant's system, the rolling stock on the entire system had become so intermingled as to be incapable of division according to the ownership of the several lines of road or according to the several mortgages; and that any attempt to control or dispose of portions of such rolling stock by courts not having jurisdiction of the whole and not competent to deal with the entire property as a unit would produce great confusion and uncertainty, and result in great loss to all persons interested in the rolling stock or in complainant's property or securities.

The bill further averred that the complainant's directors and officers had thoroughly considered and already resorted to all proper means for obtaining the funds by which to pay the floating indebtedness of the company and meet the ac-

cruing interest falling due at the beginning of the month of June then next, and continuing to mature by installments at very short intervals, but had wholly failed to provide the means with which to discharge the floating indebtedness and meet the interest; and the company was powerless to accomplish such purpose, and was practically insolvent, and it was certain that a default would occur in June, and complainant be also without means of meeting the floating indebtedness.

It was further stated that complainant's interest in the road and the interests of all its creditors and bondholders were greatly imperiled by the existing prospect of the disruption of the road on the happening of the default; and that, if the lines of railroad were broken up, and the fragments thereof placed in the hands of various receivers, and the rolling stock, materials, and supplies seized and scattered abroad, the result would produce irreparable injury and damage, not merely to complainant, but to all persons having any interest in the road and the securities thereof. Complainant, therefore, "to prevent the breaking up of said lines of road, and the scattering abroad of its assets," and "in order to the preservation of the interests of large numbers of persons, stockholders, and creditors unknown to orator, and in order to the protection of the interests of all concerned, and to prevent a great multiplicity of suits," prayed the court to appoint one or more receivers, "and empower and direct such receiver or receivers to take possession of said entire property, and to preserve, operate, and manage and control the same, collect all indebtedness due or to become due to orator, and otherwise to discharge all the duties ordinarily imposed by courts of equity on the receivers of railroad property by such courts appointed; that on a final hearing of said cause your honors will, under this bill, or under such amendments as may be made thereto, or such supplemental bills as shall be filed herein, or such cross bills as parties in interest may also file, decree the sale of said entire property, whether such decree shall judicially foreclose said general mortgage or any of the other mortgages aforesaid, or whether such decree shall dispose of said property as a trust fund on general equitable principles; that your honors will cause all the liens upon said property, or any part thereof, and all rights, claims, and equities of all persons interested therein to be ascertained, defined, and determined, and that the proceeds arising from the sale of such property, or any part thereof, be applied under the orders and decrees of this court, according to the rights, interests, and equities of parties or persons interested in said



fund;" that all persons and all corporations having possession of complainant's property, or any part of it, be directed to surrender the same to such receiver or receivers as might be appointed, or to hold such property or portions of property under such receiver or receivers, if the latter shall elect to pursue such course; and that such order may be made "as will insure the protection of the interests of orator and its creditors, giving an opportunity to all the defendants not served with notice to be heard hereafter; and orator avers that no injury can arise to any creditor or person in interest from the appointment of the said receivers with or without notice, as such receivers' possession will inure to the benefit of all the persons concerned."

Upon the filing of the bill an order was thereupon made on the same day appointing Solon Humphreys and Thomas E. Tutt receivers of the railroads and property of the company; and it was ordered "that the said receivers, out of the income that shall come into their hands from the operation of said railroad or otherwise, proceed to pay all balances due to other railroads or transportation companies, or balances growing out of the exchange of traffic accruing during six months prior hereto; that said receivers also in like manner pay all rental accrued, or which may hereafter accrue, upon all leased lines of said complainant, and for the use of all terminals or track facilities, and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for; that said receivers also pay in like manner, out of any incomes or other available revenues which may come into their hands, all just claims and accounts for labor, supplies, professional services, salaries of officers and employes that had been earned or have matured within six months before the making of this order; \* \* \* that such receivers keep such accounts as may be necessary to show the source from which all such income and revenues shall be derived with reference to the interest of all parties herein, and the expenditures by them made."

The receivers qualified on May 29, 1884, and took possession of all lines of railroad which at that date were held or operated by the Wabash Company. On June 9, 1884, the trustees in the general mortgage appeared and filed their cross bill, in which they prayed for the foreclosure of their mortgage, and for the sale of the property, and also asked for the appointment of receivers; but the court refused to make such appointment. These trustees afterwards filed an

amended cross bill, and at a still later date an original bill in one of the state courts of Missouri, which was removed to the United States court, and consolidated with the original suit. These bills contained prayers for the foreclosure of the mortgage and the appointment of receivers.

June 26, 1884, the receivers petitioned the court for advice, stating that from the incoming rents and profits of the property they were unable to pay on the 1st day of June, 1884, the interest falling due on certain classes of bonds and dividends on certain specified stock. And they further stated, in respect of 28 other classes of bonds enumerated in the petition, that the earnings of the lines upon which these bonds were secured had until this been sufficient to meet the operating expenses, cost of maintenance, and interest payments; but in respect to 10 other classes of bonds, of which the bonds of the Quincy Company constituted one, "that the earnings of none of the lines or divisions last above described have at any time since their acquisition been sufficient to pay their operating expenses, the cost of their maintenance, and interest on the several series of bonds, and other obligations above described, and secured upon each of them, respectively, by mortgage or deeds of trust."

The petition was referred to a master, who reported thereon June 28, 1884, and recommended the entry of an order directing the receivers, "from the incoming rents and profits of said property, after meeting such other obligations as they have been directed to discharge by the former orders of this court, pay from whatever balance may remain in their hands the interest, as the same shall from time to time mature, upon the following bonds or other obligations secured by mortgage on the several lines or divisions" enumerated whose earnings had been sufficient to pay the interest. The order further provided "that the receivers herein, until otherwise directed, keep the accounts of all the earnings and incomes from, as well as the accounts of all the operating expenses, cost of maintenance, and taxes upon, the following lines or divisions of said property separately, to wit," and here follow the lines which had not earned interest, including the Quincy Company; "and that said receivers make quarterly reports thereof, showing not only the income and expenses of each of the lines aforesaid, but also the methods by which the incomes and expenses of said lines were respectively ascertained;" and this report was confirmed."

On September 20, 1884, the receivers filed a petition for instructions as to interest due on bonds of the Havana divi-

sion; and on October 15, 1884, the court stated, upon the matter being again brought up, that money that belonged to the underlying mortgages would not be taken to pay interest on nonearning branches.

December 16, 1884, the Quincy Company filed an intervening petition, in which it set forth that interest on its bonds was in default, and "that it has no means, property, or moneys, aside from what is covered by said mortgage, and that it is without any means of paying said overdue and defaulted interest;" that it believed that, if default in the payment of interest should continue, the bondholders would require the sale of the mortgaged property under the terms of the mortgage; that it had applied to the president of the Wabash Company and others of its officers for information, but had been unable to obtain any of an intention on the part of the company, or any one for it, to make such payment; and it prayed that the company or defendants, or some one of them, should pay the interest on the bonds in default July 1, 1884, or that such interest be paid out of the funds of the Wabash Company in the charge or under the control of the court or the receivers, or that the court order that the lease between the petitioner and the Wabash Company be transferred to the St. Joseph & Quincy Railroad Company, which latter company would pay the interest coupons in arrears, and would either pay or give security to pay the interest coupons about to mature January 1, 1885, and would assume any and all liabilities resting upon the Wabash Company, or to which it was subject by reason of the existence of or under said lease. This petition was answered by the receivers and the Central Trust Company and Cheney, trustee, and April 16, 1885, it was ordered that whenever within 60 days from that date the St. Joseph & Quincy Railroad Company should pay to the trustees on the first mortgage an amount equal to the coupons on the first mortgage of the Quincy Company due July 1, 1884, and January 1, 1885, in payment of said coupons, and should assume by proper agreement in writing the liabilities and obligations to be performed by the lessee under said lease, then said lease should become assigned and vested in the St. Joseph Company, freed from any liens or rights of the Wabash Company or the trustees under the general mortgage.

On January 8, 1885, the receivers reported the incomes and earnings from, as well as the operating expenses, cost of maintenance, and taxes of, the Quincy Company from May 29 to September 30, 1885, showing a deficit of \$1,416.78; and on the 2d of March, 1885, made a similar report, showing a deficit of \$9,021.82 from Oct. 1 to December 31, 1884; and

on May 15, 1884, a report showing a total deficit up to February 28, 1885, for 9 months, of \$20,251.09. On March 20, 1885, the receivers filed a petition setting forth in detail the earnings and operating expenses of all the branch and leased lines of the Wabash Company from May 29 to November 30, 1884, and prayed orders with respect to the future operation of the lines, and concerning the payment of the respective rentals which the Wabash Company had agreed to pay. Upon this petition the court made an order, April 16, 1885, which was entitled: "In the matter of the application of the receivers for the cancellation of certain leases." By this order the court directed (1) "that subdivisional accounts must be paid separately." (2) "Where any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus and only to the extent of the surplus." (3) "Where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized." (4) "Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph & St. Louis branch, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing though a discriminating hand,—that is, if a subdivision does not earn operating expenses, and receivers are running two trains a day, then lop one of them off; if they are running one train a day, and still it does not pay, then run one train in two days. While the court will endeavor to keep that subdivision in operation, it will make the burden of it to the consolidated corporation, and to all the other interests put into that consolidated corporation, a minimum."

These directions were given in an opinion which was ordered to stand as the order of the court in respect to the matters therein referred to. 23 Fed. Rep. 863. July 15, 1885, Gilman and Bull, trustees under the mortgage of the Quincy Company, petitioned for the possession of its property. The petition was granted by the court, and the receivers were ordered to surrender and transfer said property to the trustees on or before August 1, 1885, which was done.

On July 1, 1884, an installment of interest on the bonds of the Quincy Company, for \$36,120, became due and was not paid. On January 1, 1885, another like installment became

due, and was not paid. On July 1st, 1885, another like installment became due and was not paid. The rent due for the month of July amounted to \$6,020, and was not paid. The foregoing installments aggregated \$114,380. The taxes on the railroad of the Quincy Company for the year 1884 amounted to \$16,000, and were not paid by the Wabash Company or the receivers, but by the trustees for the Quincy Company, who also made repairs upon said railroad at an expense of \$15,000.

December 8, 1885, the trustees, Gilman and Bull, filed a petition, in which application the Quincy Company united June 12, 1886, by a separate petition. These petitions prayed that the court would order the receivers to pay the Quincy Company or the trustees, for the bondholders, the sum of \$114,380 for interest, \$16,000 for taxes and \$15,000 for necessary repairs, "being the rental due on account of the said lease of the property" of the company; and that the court would decree that said sums "are liens superior and paramount to all mortgages on all the property of the said Wabash, St. Louis & Pacific Railway Company." The prayer of the trustee's petition was confined to the sum of \$114,380.

January 6, 1886, a decree was entered foreclosing the mortgages upon the property of the Wabash Company known as the "general mortgage" and the "collateral trust mortgage." The court found due upon the general mortgage the principal sum of \$17,000,000, and for interest, \$2,132,753.40, up to December 1, 1885; and upon the collateral trust mortgage the principal sum of \$10,000,000, and \$1,109,268.80 interest. In default of payment of these sums, the court directed the sale of the mortgaged property, excluding, however, the property of the Quincy Company. The court decreed that the sale and conveyance of the mortgaged property should not have the effect of discharging any part of said property from the payment of claims that had been or might be charged against the same or the receivers by the court making the decree, or any other circuit court exercising ancillary jurisdiction, or by any other court to which any of the parties to said decree had been remitted, and that the property should be subject to be retaken, and if necessary, resold, if the sums so charged or to be charged against it or said receivers should not be paid within a reasonable time after being required by order of court. The mortgaged property was thereupon sold, but no surplus realized.

The net earnings of the Wabash system from the time the receivers took possession to the time when they surrendered

the road of the Quincy Company was \$1,012,857.39, which was \$3,304,633.61 less than the amount of preferred debt existing when the receivers took possession. The petitions of the trustees, Gilman and Bull, and of the Quincy Company were referred to a master, who reported against the claims therein set forth. Exceptions were argued before the circuit court and overruled, the report confirmed, and the petitions dismissed, whereupon the petitioners brought the case by appeal to this court. The opinions of BREWER, Circuit Judge, and THAYER, District Judge, will be found reported in 34 Fed. Rep. 259.

*D. H. Chamberlain*, for appellant.

*Everett W. Pattison, Edwd. W. Sheldon and James Thomson*, filed briefs on behalf of appellant by leave.

*Thos. H. Hubbard and Wells H. Blodgett*, for appellees.

FULLER, C. J.—When the receivers were appointed, the Wabash Company consisted of a system controlling some 3,600 miles of road, made up by the consolidation and leasing of many different railroads, upon nearly every one of which there existed one or more mortgages. The company was insolvent; its preferential indebtedness amounted to nearly four and one-half millions; its credit was gone; and many parts of the property were in a wretched condition. The bill was obviously framed upon the theory that an insolvent railroad corporation has a standing in a court of equity to surrender its property to the custody of the court, to be preserved and disposed of according to the rights of its various creditors, and, in the mean time, operated in the public interest. The relief sought was predicated upon the view that those rights were not changed by the application, and that the proceeding was in the interest of each and all of them, as such interest might appear. The bill is characterized by one of the counsel as “without precedent.” We are not called upon to inquire as to how that may be, but we readily agree that the concession to a mortgagor company of the power through its own act to displace vested liens by unsecured claims is dangerous in the extreme. But no such concession was made here. On the contrary, from the beginning, the court, by repeated directions and orders, fully recognized the fact that none of the numerous defendants had consented that their rights, whatever they might be, should be subordinated to those of others to which they were superior, and that no defendant should be subjected to loss of priority because necessarily brought into association with others by the bill.

In the order of appointment, the receivers were directed

Appointment  
of receiver by  
application of  
company.

to pay out of the income that should come into their hands rental which had accrued or which might accrue upon all complainant's leased lines, but to keep accounts, showing the source of income and revenue with reference to expenditure. Immediately, and within a month thereafter, the receivers called the attention of the court to the fact that the earnings of 10 enumerated lines or divisions had not at any time since their acquisition been sufficient to pay their operating expenses, the cost of their maintenance, and interest on the bonds and other obligations secured upon each of them, while certain others had; and by the confirmation of the master's report, which was made on the 28th of June, 1884, the court, adopting its recommendations, direct that the receivers should pay interest on the bonds or obligations secured on the several paying enumerated lines or divisions, from whatever balance of income might remain in their hands, after meeting other obligations; and that an account should be kept of the earnings and incomes from, as well as the accounts of all the operating expenses, cost of maintenance, and taxes upon, certain other enumerated lines or divisions, including that of petitioner. This was followed by the declaration of the court that the earnings of the branches which earned their interest were not to be taken to pay interest on nonearning branches, but that the concerns which had not earned running expenses would be permitted to collapse. Then came the intervening petition of the appellant company for a transfer of the lease, which petition was granted; but the order of court was not availed of or acted upon by petitioner.

The order of April 16, 1885, reiterated the position taken by the court, and specifically pointed out that, where there was no income, rental claims would not be paid.

The petitioners, however, after taking possession of their road, asked the court to decree, not the allowance of their rental claims, and those for repairs and taxes paid, as unsecured indebtedness, but a lien in their favor for those amounts superior and paramount to the mortgages on the property of the Wabash Company. They sought, in other words, to have these claims charged upon the *corpus* of the property in preference to subsisting contract liens; and they based this contention upon the proposition that the receivers had adopted the lease, and made themselves, and the property in their hands, liable according to its terms.

It is not asserted that these receivers became the assignees of the unexpired term of the leasehold estate with the right to dispose of it, but it is claimed that, because they took possession of the railroad of the Quincy Company, and held and

Operations of  
leased road—  
Rentals as  
lien on earn-  
ings of gen-  
eral system.

operated it until August 1, 1885, they became liable to the extent of the rental up to that time. But the receivers were not statutory receivers, nor did they occupy identically the same position as assignees in bankruptcy or insolvency, and the like. They were ministerial officers, appointed by the court of chancery to take possession of and preserve, *pendente lite*, the fund or property in litigation; mere custodians, coming within the rule stated in *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 236, where this court said: "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property."

As observed, in relation to such a receiver, by the supreme court of Maryland, in *Gaither v. Stockbridge*, 67 Md. 222, 224, cited by counsel for appellee: "It is manifest that the scope of his duties and powers are very much more restricted than those of an assignee in bankruptcy or insolvency. In the case of an assignee in bankruptcy the law casts upon such assignee the legal title to the unexpired term of the lease, and he thus becomes assignee of the term by operation of law, unless, from prudential considerations, he elects to reject the terms as being without benefit to the creditors. But not so in the case of receivers, unless it be, as in New York, and some of the other states, where, by statute, a certain class of receivers are invested with the insolvent's estate, and with powers very similar to those vested in an assignee in bankruptcy. *Booth v. Clark*, 17 How. (U. S.), 331. The ordinary chancery receiver—such as we have in this case—is clothed with no estate in the property, but is a mere custodian of it for the court; and, by special authority, may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned. If the order of the court, under which the receiver acts, embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the term, in any proper sense of the word. He holds that as he would hold any other personal property involved, for and as the hand of the court, and not as assignee of the term."

But appellants insist that, without regard to privity of estate or privity of contract, receivers in chancery are liable, not for a reasonable rental value during the occupancy of leased property committed to their charge by order of court, but for rental according to the covenants of the leases when-



ever there are unequivocal acts of use in control of such property; and that they thus adopt the leases and become bound by their terms so long as such use and control continue. It is said that this is settled doctrine, and that whether receivers take as statutory or common law or *quasi* or equitable assignees; whether the title is in them, or the estate, or the whole estate, has vested in them, or whether they hold as mere custodians for the court,—is immaterial; that they are put to an election to assume or to reject the leases, and, if they elect to avail themselves of them, they are bound to respond according to their terms. This position ignores any distinction between those who take by operation of law and those who do not, but, inasmuch as it confessedly requires the application of the same rule as in the case of statutory receivers, assignees, and liquidators, this branch of the controversy may be disposed of on appellants' own ground.

That rule is thus stated in Mr. Platt's work on Leases (volume 2, p. 435), in reference to assignees in bankruptcy: "A reasonable time was allowed the assignees to ascertain the value of the lease before they made their election; for which purpose they might have it valued, or put up for sale, without danger of such act being deemed an acceptance. If, however, they accepted a bidding, or dealt with the estate as their own, or used it in a manner injurious to the persons otherwise entitled they were not within this protection." The principle that such assignees shall not be held, unless by their consent, to take what will charge the estate with a burden, has been often applied by this court, (*Glenny v. Langdon*, 98 U. S. 20; *American File Co. v. Garrett*, 110 U. S. 288, 3 Am. & Eng. Corp. Cas. 124; *Sparhawk v. Yerkes*, 142 U. S. 1), and also by the state courts, as in *Martin v. Black*, 9 Paige, (N. Y.) 641, by Chancellor WALWORTH; in *Com. v. Franklin Ins. Co.*, 115 Mass. 278, by Judge ENDICOTT; in *Berry v. Gillis*, 17 N. H. 9, by Chief Justice PARKER; and in many other cases.

It is thus expounded in respect of official liquidators under the English "Companies Act," by Lord Justice LINDLEY, in *Re Oak Pits Colliery Co.*, 21 Ch. Div. 322, 330.

"(1) If the liquidator has retained possession for the purposes of the winding up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it, or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding up. \* \* \* (2) But if he has kept possession by arrangement with the landlord, and for his benefit as well as for the benefit of the company, and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain. \* \* \* When the

liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full, like any other debt or expense properly incurred by the liquidator for the same purpose; and in such a case it appears to us that the rent for the whole period during which the property is so retained or used ought to be paid in full, without reference to the amount which could be realized by a distress. \* \* \* But no authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee. If the landlord had endeavored to re-enter, and the liquidator had objected, the case might be different, but, having regard to the provisions of the Companies Act of 1862, we are of opinion that in the case now supposed the landlord must rely on his right, if any, to re-enter and prove for the arrears due to him, and that he is not entitled to anything more."

In *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 322, where an oil company contracted with a railway company to purchase certain rolling stock and lease the same to the railway company at a specified rental, the latter agreeing to purchase and pay for it in cash on or before a given date, or, if it should be unable to do so, to turn it over to the oil company at the expiration of the contract, in good order and condition, and the railway company became insolvent, and its mortgage bondholders instituted proceedings to foreclose, and had a receiver appointed, it was said: "The receiver did not simply, by virtue of his appointment, become liable upon the covenants and agreements of the railway company. *High, Rec. § 273; Hoyt v. Stoddard*, 2 Allen (Mass.) 442. Upon taking possession of the property, he was entitled to a reasonable time to elect whether he would adopt this contract and make it his own, or whether he would insist upon the inability of the company to pay, and return the property in good order and condition, paying, of course, the stipulated rental for it so long as he used it." As between the mortgagees invoking the interposition of the court and the oil company, the agreed rental was held to be the proper payment to be made for the use of the rolling stock under the particular contract in question.

Tested by this rule we are of opinion that these receivers did not become bound by an election, or by reason of any act of their own, or by any order of the court.

The court did not bind itself or its receivers *eo instanti* by the mere act of taking possession. Reasonable time had necessarily to be taken to ascertain the situation of affairs. The Quincy Company, as a *quasi* public corporation operating a public highway, was under a public duty to keep up and maintain its railroad as a going concern, as was the Wabash Company under the contract between them; but the latter had become unable to perform the public service for which it had been endowed with its faculties and franchises, and which it had assumed to discharge as between it and the other company. Its operation could only be continued under the receivers whose action in that respect cannot be adjudged to have been dictated by the idea of keeping the property in order to sell it, or using it to the advantage of the creditors, or doing otherwise than "abstain from trying to get rid of the property." Clearly this was no case of the employment of the property of another for one's own benefit. Within a month the receivers applied to the court for instructions, distinctly setting forth that there was no income wherewith to pay the rental in question, and the order of court, entered at once, proceeded upon the theory that they were not to be bound by the rental prescribed.

Nor was there any resistance by the receivers, or impediment interposed by them, to the re-entry of the Quincy Company. The receivers did not so remain in possession, nor were they authorized by the court to so remain, as to render the lessor unable itself to resume possession. The lease gave the Quincy Company the option to re-enter, and put an end to it, upon default in payment of rental continued for 30 days. Default in fact did not occur until July 1, 1884, but upon the face of the bill the utter inability of the Wabash Company to pay rent appeared; and under the circumstances, it is unreasonable to suppose that if appellants had applied to the circuit court for possession of the property earlier than they did, the court, in view of the state of case disclosed by the record, would have declined to hand it over. Such application was made December 16, 1884, and an order granted accordingly, but not availed of by the Quincy Company. Subsequently, on a renewed application, the company retook its road, freed from any liability for the enormous preferential indebtedness of the Wabash Company, and with its public duty discharged up to that time by the receivers at a loss of more than \$20,000. The lease had not therefore been canceled by the court, doubtless because it was considered that that ought not to be done without the assent of the lessor: but the court said: "The right of a lessor or mortgagee, whose rent or interest is unpaid, to insist upon possession or

foreclosure, will be promptly recognized." This was as late as April 16, 1885, but it was consistent with the order of June 28, 1884, and the position of the court throughout. Indeed, there can be no pretense that the Quincy Company or its trustees were encouraged to remain inactive in reliance on payment of rental under order of court unless the earnings of their road justified it.

Our conclusion is that the receivers, as such, did not become so committed to the terms of the lease as by reason thereof to be subjected to an obligation requiring the rental to be paid out of the property of the Wabash Company in preference to the payment of the mortgagees of that property. Whether that rental might be preferred in payment to the unsecured debts if there had been any equity in the mortgaged premises is a question not arising for decision.

If the receivers were not bound as having become virtually assignees of the lease or by reason of any acts of their own or orders of the court were the petitioners entitled to the relief they prayed upon any ground heretofore recognized as justifying such imposition upon the *corpus* of the property in priority to the claims of lien creditors?

Restoration  
of diverted  
earnings—  
Equitable  
claim.

In *Morgan's etc., Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 197, 45 Am. & Eng. R. Cas. 631, we said that the doctrine of *Fosdick v. Schall*, 99 U. S. 235, is "that a court of equity may make it a condition of the issue of an order for the appointment of a receiver that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver or from the proceeds of sales; that, the property being in the hands of the court for administration as a trust fund for the payment of incumbrances, the court, in putting it in condition for sale, may if needed recognize the claims of material, men and laborers, and some few others of similar nature, accruing for a brief period prior to its intervention, where current earnings have been used by the company to pay mortgage debt or improve the property, instead of to pay current expenses, under circumstances raising an equity for their restoration; as, for instance, where the company, being insolvent and in default, is allowed by the mortgage bondholders to remain in possession and operate the road long after that default has become notorious, or where the company has been suddenly deprived of the control of its property, and the pursuit of any other course might lead to cessation of operation. *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 311, 312; 12 Am. & Eng. R. Cas. 464. If the officers of the company, remarked Mr. Chief Justice WAITE in *Fosdick v. Schall*, 'give to one class of creditors

that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. \* \* \* Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that, if there has been in reality no diversion, there can be no restoration, and that the amount of restoration shall be made to depend upon the amount of the diversion.' *Burnham v. Bowen*, 111 U. S. 776, 17 Am. & Eng. R. Cas. 308; *Union Trust Co. v. Illinois M. R. Co.* 117 U. S. 434," 25 Am. & Eng. R. Cas. 560.

The immense floating debt for supplies and other preferential claims here precludes the inference that there was any such diversion of earnings applicable to the payment of rental; and the priority asked cannot be rested on that ground.

In *Wallace v. Loomis*, 97 U. S. 146, 162, it was said by Mr. Justice Bradley, speaking for the court: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day, be seriously disputed. It is a part of that jurisdiction always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is undoubtedly a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund."

But here this rental was certainly not an expense originated in the process of administration by the court, and the road was surrendered as soon as the lessor would take it. Nor did the mortgagees consent to have the claim charged upon the *corpus* of the property in preference to their mortgages. The case does not come within *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 43 Am. & Eng. R. Cas. 519; *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 313, 12 Am. & Eng. R. Cas. 464, or any other of the authorities cited.

We do not discover any equitable ground upon which appellants are entitled to preference in the distribution of the proceeds of the sale of the mortgaged property. The cost of the maintenance of the Quincy road by the receivers exceeded its total earnings; and the net earnings of the whole Wabash system, before the Quincy Company retook its road, did not amount to one-quarter of the amount of pre-

ferred debt existing when the receivers were appointed. The property was surrendered to it freed from any charge for that debt, to the payment of which it contributed nothing. The action of the court in making the appointment of receivers on the application of the mortgagor cannot be successfully challenged upon this appeal. The theory of the bill and the action of the court and its officers left all the creditors with their rights existing as they existed before the appointment was made, and we find no legal or equitable grounds upon which the prior lines of the mortgagees can be displaced.

The decree of the circuit court dismissing these petitions was right, and it is affirmed.

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FINANCE CO. OF PENNSYLVANIA *et. al.*,

*v.*

CHARLESTON, CINCINNATI & CHICAGO R. CO.

*Ex parte* MOORE.

(*U. S. Circuit Court, D. S. Car., March 11, 1892, 49 Fed. Rep. 693.*)

**Appointment of Railroad Receiver—Mortgage Foreclosure—Preference of Employes Wages—Claim of Furnisher of Supplies.**—Where a court of equity, on appointing a receiver for a railroad, imposes as a condition an order requiring the payment of wages due employes for a certain period prior to the receivership, such an order is merely a personal protection given to the employes as a matter of favor because of their dependence upon their daily labor for support and does not include a claim by a merchant for supplies or rations furnished to the employes under contract with the company, although such rations were charged to the employes as part of their wages. The claim is however entitled to preference over the payment of interest on the mortgage bonds, and if any sums applicable thereto have been used to pay such interest or for permanent improvements by which the bondholders have been benefited, the claim will be a charge, to the extent of the money so used, upon any earnings in the hands of the receiver, or, if these are insufficient, upon the proceeds of the sale of the road.

*Mitchell & Smith* and *B. A. Hagood*, for petitioner.  
*A. T. Smythe*, for respondent.

**SIMONTON, District Judge.**—The petitioner is a merchant at Blacksburg, a town on the line of the Charleston, Cincinnati & Chicago Railroad. In 1890 he entered into a contract with the defendant company to furnish rations to hands employed by it. The company charged these rations to the hands as part of their wages. The items were all charged to the railroad company. The accounts were regularly made out against, and presented to the com- Case stated.

pany, audited, and passed. Upon bill filed by the mortgage bondholders, a temporary receiver was appointed on 10th December, 1890. On 26th February, 1891, the permanent receiver was appointed. In the order appointing the permanent receiver is this provision: "That the receiver pay all wages due to the employes at the date of the order appointing a temporary receiver herein for labor or services, within ninety days before the same." The petitioner presents and proves an itemized account wherein it appears that, within the 90 days before December 10, 1890, he had furnished to the company, under his contract, \$321.72; and that prior to that date, from May 14, 1890, he had furnished the rest of the items on his account. The whole account, including both periods, foots up \$902.80. He claims that, inasmuch as he furnished rations which were used in part payment of wages to employes, he comes within the equity of this order of 28th February, and that as to the rest of his account he comes within the equity established in *Fosdick v. Schall*, 99 U. S. 235.

As I understand the current of cases which began with *Fosdick v. Schall*, the rule is this: When holders of railroad

**The doctrine  
of *Fosdick  
v. Schall*.**

bonds, secured by mortgage, come into a court of equity, and ask not only the foreclosure of the mortgage, but also the appointment of a receiver, into whose hands the corporation shall be compelled to deliver all its property, the court, as a condition precedent to granting this last request, can impose terms in reference to the payment from the income during the receivership of such outstanding claims as address themselves peculiarly to the protection of the court. Ordinarily a mortgagor is entitled to the possession of his property until the execution of a decree of foreclosure. When the mortgagor is a railroad company, the employer of many persons on weekly wages, both the employer and employed can enter into engagements relying upon this normal condition. If, therefore, the court, at the instance of mortgage creditors interrupts the possession of the railroad company, and suddenly removes the employer from control of current earnings, it may well see to it that the employed are not put at a disadvantage, or be made to suffer from this unexpected change. Without considering liens or equities, acting only in its discretion, it imposes upon the suitors, as the condition of granting their request, that such employes be paid, not only accruing wages, but such as have accrued within a reasonable period. This is not a right vested in the employes or an equity administered in their favor. It is a personal protection given to them by the court *ex gratia*, moved

thereto by the fact that this class depend upon their daily labor for their daily food. Afterwards when the court has assumed the administration of the property, and it appearing that there are certain outstanding claims in the hands of persons who furnished equipment materials, supplies, or anything which was necessary to keep the railroad a going concern, then the court administers an equity, and the benefits of this equity inure as well to the original parties keeping up the road as to their assignees. *Union Trust Co. v. Walker*, 107 U. S. 596.

In the present case, when the complainants made their application for a receiver, the court took into consideration what conditions should be imposed on the grant of their prayer. These conditions were payment of wages due to the employes within 90 days before 10th December, 1890. There are no wages due. The petitioner did not pay them any wages; did not deal with nor credit them. He furnished the company with goods, charged them to the company, and looked to the company only. There is nothing like subrogation here; and, as the employes themselves are paid, not as a matter of right, but as a matter of grace, nothing to be subrogated to. Dealing with the interest of mortgagees in railroad property, we encounter vested rights. They cannot be displaced upon any mere idea of right, or on any refined notions of equity. In managing the property, the court is not the owner, nor can it entertain sentiments of benevolence or humanity in disbursing the funds,—luxuries in which the owner alone can indulge. So much of the petition as prays special priority under the order of 28th February, 1891, is disallowed. The claim comes under the principles laid down in *Fosdick v. Schall*. We have already passed upon several claims of this character in the intervention of the *Pocahontas Coal Co. et al.* in the main cause, (48 Fed. Rep. 188.) Let the claim of the present petitioner be included with those claims to the amount proved, \$902.80, and share the same fate.

Rights of  
merchant  
furnishing  
railroads.

**Rule in *Fosdick v. Schall*.—Payment of Current Expenses During Receivership.**—See *post*, *Bound v. South Car. R. Co.* and note.



## BOUND

v.

SOUTH CAROLINA R. CO. *et al.* (LACKAWANNA IRON & COAL CO. INTERVENORS.)

(*U. S. Circuit Court, D. S. Car., July 20, 1891, 47 Fed. Rep. 30.*)

**Mortgage—Equitable Rights of Material Man—Second Mortgage.**—A railroad company whose road was covered by two mortgages bought of a manufacturer a large lot of steel rails which were absolutely necessary for the continued operation of the road and gave therefor three notes which the president promised should be paid out of the earnings of the road. Subsequently, on application of the holders of the second mortgage the road was placed in the hands of a receiver. *Held* that, as against the holders of the second mortgage, the equitable claim of the manufacturer would take preference and he would be entitled to have the earnings of the road in the receiver's hands applied first to the payment of his claim.

**Same—Rights of Holders of First Mortgage.**—In such a case however, the manufacturer's claim would have no preference over those of the holders of the first mortgage. These latter not having invoked the aid of the court, although they filed cross bills in the suit, stand in their legal right.

IN Equity.

*Rutledge & Rutledge*, for intervenors.

*Mitchell & Smith* and *A. B. Hagood*, opposed.

SIMONTON, J.—In April, 1888, the South Carolina Railway Company purchased from the Lackawanna Iron & Coal Company 1,500 tons of steel rails. These rails were absolutely necessary for the purposes of the company, and without them the Camden branch—an important part of its road—could not have been kept up. Three notes were given for the rails, aggregating \$50,255.93, maturing in November, 1888. When the purchase was made the president of the railway company promised to pay them out of the earnings of the road, and selected the period of maturity with that end in view. When the notes fell due the company could not pay them, and they were extended for 90 days more. The period thus fixed was specially selected because the earnings at that time exceeded the earnings of any other part of the year. One of the notes was paid in September, 1889; the others are still unpaid, aggregating of principal the sum of \$35,736.78, interest from March 10, 1889, on \$17,784.59, and March 12, 1889, \$17,952.19. The South Carolina Railway Company made default of the interest on its second mortgage bonds on April 1, 1888. It made default of the

interest on its first mortgage bonds on April 1, 1889. It went into the hands of the receiver October 7, 1889, in proceedings instituted by a second mortgage bondholder in behalf of himself and others of this class for the foreclosure of the second mortgage. During the entire period from the making to the final dishonor of these notes, the gross earnings of the company exceeded the operating expenses. As we have seen, no interest was paid on second mortgage bonds after the giving of these notes. But it appears that after April, 1888, and while these notes were running to maturity, certain bills payable of the railway company were paid out of the earnings, and that these bills were made in order to raise funds which had been applied, among other things, to the payment of interest on second mortgage bonds. The Lackawanna Company now intervenes, and prays that its claim be paid out of the earnings of the road in the hands of the receiver.

The supreme court has established that a railroad mortgage, so long as the road is kept a going concern, is a peculiar piece of property. The holder of a bond secured by such a mortgage takes it with notice that the earnings of the railroad, notwithstanding that they may have been specially pledged for his debt, must first be applied to the current expenses, labor, supplies, equipment, and such permanent improvements as are absolutely necessary before they can be used for the payment of his interest. And if perchance he be paid, leaving these or any of these unpaid, this would be the diversion of the fund, and a person holding any such exceptional claim has an equity, under certain circumstances, to be reimbursed, by having such diversion corrected out of the income in the hands of the company; and, if in the mean time a receiver has been appointed, out of the earnings in the hands of the receiver. This is an equity founded upon the doctrine that the officers of a railway company are trustees, or, perhaps, we should say the recipients and holders, of a trust fund, applicable first to claims of this character, and after them to the interest on the mortgage debt. The origin and reason for this equity are found in the fact that a going railroad is of public concern, and must be kept up. Those who contribute to keep it up and so subserve the public weal are rewarded. This equity is enforced whenever suit is brought by the mortgagee to enforce his mortgage, and is held superior to the legal lien of the mortgage. This doctrine was first distinctly set out in *Fosdick v. Schall*, 99 U. S. 235, and is sustained by a current of authority. *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 12 Am. & Eng. R. Cas. 464; *Union Trust Co. v.*

Equitable  
lien of material men.

Souther, 107 U. S. 591, 11 Am. & Eng. R. Cas. 707; Burnham *v.* Bowen, 111 U. S. 776, 17 Am. & Eng. R. Cas. 308. It seems to have been shaken in *Kneeland v. American Loan & Trust Co.*, 136 U. S. 87, 43 Am. & Eng. R. Cas. 519, but in *Kneeland v. Bass Foundry & Mach. Works*, 140 U. S. 592, the court quotes with approval *Fosdick v. Schall*, and the authorities following it, and reaffirms them. The only qualification laid down is that this equity is put in motion as to such claims only as arose within a reasonable time before the receiver was appointed. The term "a reasonable time" is an unknown, or, perhaps, an uncertain, quantity; at least it depends somewhat on the circumstances of the case and somewhat on the idiosyncracies of the chancellor. See *Paine v. Central Vt. R. Co.*, 118 U. S. 159, 25 Am. & Eng. R. Cas. 37. One of the cases fixes the limit at 90 days. *Miltenberger v. Logansport R. Co.*, 106 U. S. 288, 12 Am. & Eng. R. Cas. 464. In *Thomas v. Peoria & R. I. R. Co.*, 36 Fed. Rep. 817, 36 Am. & Eng. R. Cas. 381, six months is selected as the limit. Judge BREWER, in *Blair v. St. Louis N. & K. R. Co.*, 22 Fed. Rep. 471, says that six months is the longest time within his knowledge that has ever been given. In the present case 18 months elapsed between the purchase of the rails and the appointment of the receiver.

But, as we have seen, this claim on the part of a material man is protected by an equity. The officers of the company hold the earnings as a trust fund, in which claims of this character have a preference. The payment of interest to bondholders, these material claims being unpaid, is held to be the use of money belonging to them for the benefit of others, and the diversion of the fund entitles them to recoup. It is difficult, under these circumstances, to see how any creditor of this class can be defeated in his application for reimbursement, unless in analogy to the statute of limitations, or unless such circumstances exist as will induce the court to treat it as a stale claim, or unless he has lost an opportunity of recovering his debt from the company, or unless his laches has operated some change in the position of the mortgage creditor. At the time this debt was incurred the whole railroad property, present and future, was covered by a statutory lien, by a first mortgage, a second mortgage, and an income mortgage. The rails were absolutely necessary to keep the road a going concern. The Lackawanna Company furnished these rails, trusting to the statement of the president of the railway company that they would be paid out of the earnings. These belonged to the company, (*Fosdick v. Schall, supra.*) and the president could

Right of in-  
tervenor  
against sec-  
ond mort-  
gages.

so dispose of them. The authorities quoted show that the Lackawanna Company belongs to a class of creditors who had an equity over these earnings even as against bondholders. When the notes first matured, the railroad company had defaulted on its April and October interest of its second mortgage bonds. No action in the court on the part of the Lackawanna Company could have collected its claim. By pressure on the company it was paid one note. But, as the end of the struggle of the railroad company was inevitable, the Lackawanna Company had the right to rely upon its equity, and to look for payment out of the diverted funds. It seems to me that this claim comes within the principle and the protection of *Fosdick v. Schall*. The court enforces this equity only as against the parties who seek its aid. He who seeks equity must do equity. So rigidly is this rule applied that when a receiver is appointed at the instance of a judgment creditor the material man has no relief of this character, because as to such creditor there has been no diversion. *Kneeland v. American Loan Trust Co.*, 136 U. S. 90, 43 Am. & Eng. R. Cas. 519. In the present case the receiver was appointed upon the prayer and at the instance of the second mortgage creditors, and as against them the intervenor has an equity to have the moneys diverted to the payment of their interest restored from such portion of the earnings in the hands of the receiver as now or may become applicable to their interest. In case there are not now, and in the future there will not be, such earnings in the hands of the receiver, then the intervenors may be paid out of that part of the proceeds of sale of the mortgage property to be paid hereafter which shall be applicable to the second mortgage. The rails furnished by the Lackawanna Company were not only a necessity, but they were a permanent addition to the value of the road. They were wisely purchased, and were of immediate public benefit. They saved the branch of the road on which they were laid.

But the intervenor has no equity as against the first mortgage and other liens superior to the second mortgage. These classes of creditors did not of their own volition come into equity, and the rule cannot be applied to them to do equity. They can stand on their legal vested lien. True, in each instance they filed cross bills by leave of the court. They could not have been filed without such leave. *Indiana S. R. Co. v. Liverpool, L. & G. Ins. Co.*, 109 U. S. 168, 14 Am. & Eng. R. Cas. 606. A cross bill is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in

Rights  
against first  
mortgagees.

the original bill. It cannot introduce any matter not embraced in the original bill, for it is auxiliary to the proceedings in the original suit, and is dependent upon it. The original and cross bills are so intimately connected together that they constitute but one suit. *Ayres v. Carver*, 17 How. (U. S.) 591; *Shields v. Barrow*, *Id.* 130; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 250. The dismissal of the original bill will dismiss the cross bill. *Dows v. Chicago*, 11 Wall. (U. S.) 108; *Cross v. DeValle*, 1 Wall. (U. S.) 5; *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.*, 6 Wall. (U. S.) 742. It is evident that the cross bill is a kind of defense,—a proceeding adopted by a party because he has been brought into court by the subpoena, and adopted in order that his whole right be adjudicated, since the complainant has forced him to put a part in adjudication. This being so, the same equity does not arise against the first mortgage bondholders as against the second.

It does not appear how much of the earnings were diverted for the payment of interest on the second mortgage bonds. Let this be done before the special master, and let him report thereon.

**Railroad Mortgage—Rule in *Fosdick v. Schall*—Payment of Current Expenses etc., during Receivership.**—This subject has been exhaustively considered in the note, 38 Am. & Eng. R. Cas. 571.

**Sale of Rolling Stock with Reservation of Title—Effect of Failure to Record—Rights of Mortgagees of After Acquired Property.**—In *Central Trust Co. v. Marietta etc. R. Co.*, 48 Fed. Rep. 865, 868, a car manufacturer sold to a railroad company certain cars under an agreement by which he reserved the title to the cars until the purchase money should be paid; this agreement was in writing but was never recorded. Prior to the purchase the company had issued bonds secured by a mortgage to a trust company covering all after acquired as well as existing property. In the suit by the trust company to foreclose the mortgage the manufacturer intervened setting up his claim under his reservation of title. It was held that the trust company was not a third party within the meaning of §1955a of Georgia Code requiring that in conditional sales of property delivered to the purchaser, title can only be reserved by a writing, "duly executed and recorded as a mortgage on personality;" that the trust company therefore could not invalidate the manufacturer's reservation of title by setting of the statute, as such statute was intended only for the benefit of subsequent purchasers and creditors of the vendor. Nor were the rights of the manufacturer appealed by Laws of Ga. 1889, p. 188 validating constitutional sales of rolling stock to railroad companies with reservation of title, but requiring (§3) that such reservation shall be in writing, and shall be recorded within six months after the execution thereof; that act was also intended for the benefit of third parties only, and operated to repeal §1955a no further than to provide a different method for the execution of contracts for the conditional sale of railroad equipments. *Central Trust Co. v. Marietta etc. R. Co.*, 48 Fed. Rep. 865, 868.

**Conditional Sale of Rolling Stock—Title Reserved—Rights of Vendor as Against Subsequent Mortgage Bondholders.**—A manufacturer sold rolling stock to an improvement company reserving the title thereto until the

purchase money should be paid. The improvement company transferred the rolling stock to a railroad company in order that the latter might be enabled to raise money on bonds secured by a mortgage on its road and equipments. In a suit in equity to foreclose such mortgage, *Held* that the manufacturer having had no notice of the equities existing between the purchasers of the bonds of the railroad company and the improvement company, was entitled to the rolling stock, the title to which he had retained. *Central Trust Co. v. Marietta etc. R. Co.*, 48 Fed. Rep. 864.

**Same—Same—Resale by Improvement Company—Estoppel in Such a Case.**—The improvement company being estopped from setting up title against the bondholders by the fact that the bonds of the railroad company were placed through its instrumentality, the original vendor could take nothing by a resale to him by the improvement company of such rolling stock. *Central Trust Co. v. Marietta etc. R. Co.*, 48 Fed. Rep. 864.

**Railroad Equipped with Rolling Stock by Improvement Company—Issue of Bonds of Equipped Road—Company Estopped to Call the Transaction a Loan.**—An improvement company, interested in the construction of a railroad, and whose president was a stockholder in the railroad company and largely interested as a contractor in the construction of the railroad, equipped the railroad with rolling stock, and caused the same to be marked with the name of the railroad company, its object being to enable the railroad company to issue certain bonds, secured by mortgage on its railroad as an equipped railroad. Such bonds were issued and placed through the instrumentality of the president of the improvement company. In a suit by a holder of the bonds to foreclose such mortgage, an assignee of the improvement company intervened, claiming the rolling stock. *Held*, that the improvement company and its assignee were estopped to allege that the transaction in question constituted a gratuitous loan of the rolling stock, or to deny the title of the railway company thereto as against plaintiff. *Central Trust Co. v. Marietta etc. R. Co.*, 48 Fed. Rep. 850, *reversing* 48 Fed. Rep. 32 (abstracted 48 Am. & Eng. R. Cas. 681.)

## BOUND

*v.*

### SOUTH CAROLINA R. Co. *et al.*

(*U. S. Circuit Court, D. S. Car. June 9, 1892, 50 Fed. Rep. 853.*)

**Trustees in Railroad Mortgage—Good Faith in Declaring Secured Bonds Past Due.**—The trustees in a railroad mortgage are bound to use the utmost good faith in exercising their power to declare all bonds secured by the mortgage past due, and may exercise such power only when the best interests of the bondholders demand it. However large their discretion in such matters its exercise is subject to the control of the court.

**Sale of Road Under Mortgage Foreclosure—When Ordered.**—Where it appears that, although a railroad has been managed with ability and economy by the receiver for three years, no interest has been paid on any securities for a year, and that a majority of the lien holders urge a sale, the court will order a sale of the road notwithstanding it is opposed by the senior security holders.

IN equity.

*Mitchell & Smith*, for plaintiff.

*Wheeler H. Peckham, Louis C. Ledyard, E. Ellery Anderson, I. M. Dilloway, Smythe & Leo, S. Lord, T. W. Bacon and Asher D. Cohen* for defendants.

SIMONTON, District Judge.—This bill is filed in behalf of second mortgage bondholders of the South Carolina Railway Company, praying foreclosure of that mortgage. Case stated. The railroad property of the defendant was purchased at a sale ordered in this court, foreclosing a mortgage of the South Carolina Railroad Company. This property is now covered by several liens. The first is the lien of certain bonds of the Louisville, Cincinnati & Charleston Railroad Company, (afterwards called the "South Carolina Railroad Company,") created by statute. This lien is now represented by the claim of Henry Thomas Coghlan, which has been reduced to a decree, and at present, with interest, is about \$67,000. The next in rank is the lien of a mortgage of the South Carolina Railroad Company to Walker and others, trustees. Of the bonds secured by this lien there are outstanding, past due, \$253,825.31. Next comes the lien of the consolidated first mortgage of the South Carolina Railway Company securing bonds of the par value of \$5,000,000. The interest on all the bonds secured by these liens has been paid, except for the past year. The next lien is that of the second mortgage bonds of the South Carolina Railway Company, to which class complainant belongs. Then come income bonds and the stock. No interest has been paid on the second mortgage bonds or the income bonds since July, 1888. The bill made the railway company, the trustees of the Walker mortgage, the trustees of the first consolidated mortgage, Barnes & Sloan, the trustees of the second mortgage, and the trustees of the income bonds, and also Henry Thomas Coghlan, defendants. Cross bills have been filed by Barnes & Sloan, trustees, by Walker *et al.*, trustees, and by Coghlan. Certain holders of first consolidated mortgage bonds, Smith and others, upon petition showing reason therefor, were permitted to come in and appear in behalf of themselves and certain other bondholders of the same class and of like mind as themselves, and they also have filed a cross bill. Barnes & Sloan, trustees of the first consolidated mortgage, after service of the bill filed in this cause, and before answering, exercised the power given them in their mortgage, and declared all the consolidated first mortgage bonds past due. They then filed their cross bill, praying foreclosure of their mortgage. The cross bill of Smith and others, bondholders, under this mortgage,

antagonize the position of these trustees, aver that the act declaring the bonds past due was ill advised, in fact an improper exercise of the power uncalled for, operative only of injury to the *cestui que trust*, and void. They pray that the mortgage be not foreclosed. The cross bill of Walker and others, trustees, prays the foreclosure of their mortgage. Coghlan asks that a sale be had of all the mortgaged property to realize his debt. The income bondholders and the company concur in the prayer that the property be sold.

At the hearing the first question discussed was that between the trustees of the first consolidated mortgage and the bondholders, their *cestuis que trustent*, who arraign and antagonize their action in declaring the bonds past due, and seeking a foreclosure of the mortgage. This question was argued at length, and with great ability. There can be no doubt that, however large the discretion of trustees may be in the exercise and execution of their trusts, the court never loses its power to review the use of this discretion, and, if need be, to correct any abuse in its exercise. Perry, Trusts, § 511, and cases quoted. Compare *Michoud v. Girod*, 4 How. (U. S.) 554; *Wormley v. Wormley*, 8 Wheat. (U. S.) 441; *Oliver v. Piaatt*, 3 How. (U. S.) 400; *Markey v. Langley*, 92 U. S. 142; *Pray v. Belt*, 1 Pet. (U. S.) 670. A trustee, in dealing with his *cestui que trust*, or in the management of the trust estate, must always show *uberrima fides*. He must never lose sight of the fact that he is acting for another, who is the real beneficiary; and no thought or hope or purpose of personal advantage can have part in the motive for or in the result of his act. Perry, Trusts, § 427. If discretion be given to him by the instrument creating the trust, "this discretion may be likened to that of judges. It is not arbitrary discretion. It does not include the unrestrained power to do what the trustee pleases. To extend it that far is to make it a means of destroying the trust which it was intended to aid and maintain. The trustee, instead of doing merely what in his present circumstances he chooses to do in deference to his interests or inclinations, is to do that which his honest, disinterested judgment approves, or ought to approve. He must not act under the impulse of fraud, collusion, or self-interest." Freeman's Note to *Read v. Patterson*, 44 N. J. Eq. 211, 6 Am. St. Rep. 885. No actual fraud or collusion is charged. The objection to the action upon the part of the trustees is that it was dictated or controlled by self interest. It is alleged that the trustees Barnes & Sloan used their discretion in disregard of the interest of the holders of first consolidated mortgage bonds, against their interest in

51 A. & E. R. Cas—5.

Declaring  
bonds past  
due—Discretion  
of trustees.



fact, and in the interest of junior securities, of which Sloan was a large holder, and for whom Barnes was a trustee under the second mortgage, as well as a holder of bonds under this second mortgage. The inquiry is, were they biased by their interest? Neither of them owned a first consolidated mortgage bond, or any prior securities. Both of them were interested in junior securities. Upon notification of this suit by Bound they declared all of the first consolidated mortgage bonds past due. As the necessary result of this, the negotiability of the bonds and their value as an investment were at once destroyed. If the failure to pay coupons had depressed their market value, this action tended to depress them still more. In fact it made it the chief interest of every holder of such bonds to press foreclosure and sale of the railroad property, so as to realize their principal as soon as practicable. Those whose necessities prevented the ability to await this result had no other alternative than to sell upon a depressed market. Nor was this action on the part of the trustees essential to secure payment of the bonds in case of a sale of the road, or to compel a sale of the road, and so foreclosing the first mortgage. One coupon was past due. The aggregate was \$150,000. This would have sustained a cross bill for foreclosure of that mortgage. If such a bill was sustained, and a decree of foreclosure prepared, then the bonds could have been declared past due, or the court would have ordered the net proceeds of sale applied to them. The effect of the declaration was to make a foreclosure inevitable, and to prevent any examination or investigation into the causes of the apparent insolvency of the company. This insolvency may have been occasioned by bad and extravagant management. The correction of this may have saved the credit and solvency of the road. The action of the trustees shut out any practical result from any investigation. The trustees acted *suo motu*, without consulting a single first mortgage bondholder. On the other hand, the declaration was clearly to the interest of junior securities. It assisted materially the scheme of reorganization which had been suggested and was languishing, whereby the first mortgage bondholders were required to give up 1 per cent. of interest per annum,—take 5 per cent. instead of 6 per cent. bonds,—and thus lighten the load of the junior securities. There must have been other advantages to these junior securities, for all of them are here favoring this declaration. Yet Mr. Barnes, as trustee for the second mortgage, when asked to pursue the same course and exercise the same power with regard to the second mortgage bonds, refused to do so. It would thus appear that this act was without any advan-

tage to the first mortgage, and may have been of advantage to the junior securities. It is difficult to escape the conclusion that the trustees, owners, and guardians of junior securities, unconsciously it may be, were influenced by their own personal interest, and were blinded as to the interest of their *cestui que trust*.

In the view which we take of the case, the further discussion of this question is unnecessary. The prayer of the cross bill of Walker *et al.*, trustees, and that of Coghlan, are not resisted. They are entitled to their money. Sale of road ordered. As the railroad property is a unit, and is valuable for this reason, it will not be advisable, were it possible, to sell a part of it to satisfy these claims. It is to the interest of all parties that if a sale be had it must be of the whole. If the sale be postponed, such postponement would be in the interest of the holders of a part of the first consolidated mortgage bonds, and against the wishes of the holders of all other securities and of the railway company. The experience of the past three years shows the exercise of great economy and ability by the receiver and his subordinates. With the exception of the current year, the business has been excellent. Yet all the earnings have been needed for the equipment of the road, and for keeping it in proper order and repair. The surplus has, from time to time, been applied to the interest on the oldest securities and the past due coupons of the first consolidated mortgage. The interest on all these securities is in default one year. No interest whatever has been paid upon the junior securities. It is true that the money expended upon the road has made the whole property much more valuable, and to this extent all the securities are benefited. But primarily the senior securities enjoy the benefit of these expenditures. And it would be inequitable to deprive the junior securities of any advantage which might be derived from an enhanced price at a sale, and a recovery of a part at least of their principal. A postponement of the sale, therefore, may do no good to any but a class of the secured creditors, and may be a great injury to every other class. Where there are two classes of creditors before the court, one of which is safe at all events, and the safety of the other is doubtful, the latter class are entitled to the consideration and care of the court. All parties in interest are before us.

A decree will be passed for the sale of all the property covered by the several liens and mortgages ascertained and mentioned, in which provision shall be made declaring all first consolidated mortgage bonds entitled to payment as if past due, which decree shall provide for a sufficient cash

payment to meet the costs and expenses of the case, and to liquidate the obligations of the receiver which have been entered into with the sanction of the court.

BOND, Circuit Judge, concurs.

**Railroad Mortgage Bond—Indorsement—Right of Indorser to Foreclose Mortgage before Maturity—Coupons.**—In *Pennsylvania R. Co. v. Allegheny Valley R. Co.*, 48 Fed. Rep. 139, the Allegheny Company negotiated its coupon bonds secured by a mortgage on its road, each bond being indorsed by the Pennsylvania Company, the indorser binding itself to purchase at maturity the bonds and each interest coupon at par "and when so purchased each and all of said bonds and coupons are to be held by the said company with the rights thereby given and with all the benefit of every security thereof." The Pennsylvania Company having been obliged to purchase coupons, filed a bill before maturity of the bonds to foreclose the mortgage. It was held that such a construction must be adopted as would preserve to the bondholders their mortgage lien and that Pennsylvania Company could have no right to deprive them of it until it had fully performed its obligations as set forth in its indorsement; and that in the meantime its remedies upon the purchase coupons must be so exercised as not to impair the bondholder's security.

**Same—Sale of Road for Debt—When Ordered—Preservation of Lien of Unmatured Debt.**—Where the equities of all the parties in interest will be best subserved by a sale of the road subject to the lien of the mortgage as to the principal of the bonds thereby secured and the interest payable after the making of the sale, the sale will be decreed but equity has power in such case to so mold its decree as to order the sale of the mortgaged property to satisfy that part of the debt which is due, and still preserve the lien upon the mortgaged premises in the hands of the purchaser as to the unmatured part of the debt. *Pennsylvania R. Co. v. Allegheny Valley R. Co.*, 48 Fed. Rep. 139.

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MAYER

v.

FORT WAYNE, CINCINNATI & LOUISVILLE R. CO.

(*Indiana Supreme Court, June 15, 1892.*)

**Sale of Railroad Under Foreclosure—Liability of New Company for Debts of Old Company.**—Where the plaintiff contracts to construct a station for a railroad company, and after completion the road is sold under a mortgage foreclosure sale and bought in by the bondholders who organized a new corporation to own and operate it, such corporation is not liable to the plaintiff for the amount due on the contract, although it takes possession of and uses the station. Nor would the mere fact that the bondholders of the original company agreed that a certain sum should be set aside to pay sundry claims, create a liability on the part of the new company.

**Same—Averments as to the Identity of Old and New Companies.**—A general averment that defendant is the same corporation as the one

which entered into the contract, gives way to specific averments which show that defendant is a new corporation, organized by the purchasers at the foreclosure sale.

APPEAL from Wayne Circuit Court.

*U. D. Cole*, and *Fox & Robbins*, for appellant.

*Hackedorne, Mellett, Belle & Morris*, for appellee.

ELLIOTT, J.—The appellant alleges in his complaint that the appellee is a railway corporation organized under the laws of this state; that it is the same corporation, under a different name and holding the same property, as the Ft. Wayne, Muncie & Cincinnati Railroad Company; that the company last named executed a mortgage on the 9th day of June, 1889, to Alfred P. Edgerton and Jesse S. Williams, trustees, to secure the payment of \$1,800,000, covering all the property of the company; that this mortgage was subsequently foreclosed, and a sale of the property made upon the decree; that the purchasers of the property were bondholders and reorganized the company; that prior to the reorganization of the company by the purchasers at the foreclosure sale, the appellant entered into a contract with the Ft. Wayne, Muncie & Cincinnati Railroad Company and the Cincinnati, Hamilton & Indianapolis Railroad Company for the construction of a joint passenger station at the junction of the two roads at Connersville; that by the terms of the agreement the appellant was to receive from each of the companies \$750, and was himself to pay \$1,000 towards the construction of the station; that he performed his part of the agreement, and erected the building provided by the contract; that the building was accepted by the companies, and they entered into possession of it on the 1st day of September, 1874; that neither the appellee nor its predecessor has paid the sum agreed upon, nor any part thereof. Case stated. It is alleged, in general terms, that the sum of \$150,000 was set aside to pay sundry claims, and that the claim of the appellant was among those so provided for, but there is no allegation, directly or indirectly, showing by whom the sum named was set apart. The written contract made part of the complaint was executed between the persons holding the bonds which the mortgage was executed to secure, and it provides that the sum named shall be "retained by the company, which may be used by the board of directors in settlement of the claim of the Liverpool & London & Globe Insurance Company, and for other small claims, so far as may be required."

It is a familiar rule of pleading that specific averments

control general ones. *Reynolds v. Copeland*, 71 Ind. 422; See cases cited in *Elliott App. Proc.* § 656, p. 588, note 1. The general averment that the appellee is the same corporation as the one that entered into the contract with the appellant gives way to the specific averments, which show that the appellee is a new corporation, organized by the purchasers at the foreclosure sale. There can therefore be no recovery upon the theory that the corporation here sued is the same as the one with which the appellants contracted.

Averments as to identity of old and new companies.

The provision in the contract between the bondholders, which we have quoted, does not bind the appellee to pay the appellant any sum whatever. It simply authorizes the directors to use that sum as they may deem necessary in payment of claims. But, if it were conceded that the provision does create an

New company not liable on contract.

obligation in favor of the appellant, still there is no right to recover upon it, because it does not appear that the sum was not properly used to pay the claim specified, or other claims having rightful precedence of the appellants' claim. We understand counsel, however, to place their right to a recovery mainly upon the ground that the facts show an equitable claim. Their contention is that, as the new company used the building erected by their client, it must pay the debt of its predecessor. This contention cannot prevail. The old company was the debtor of the appellant, but the new did not become liable for that debt. A corporation formed by bondholders, who purchase at a sale upon a decree foreclosing the mortgage securing their bonds, does not become liable for the debts of the mortgagor. It is assumed by counsel that the appellee is liable in equity because it took possession of the appellant's property. But this presumption is one that cannot be supported. There is nothing in the complaint showing that the appellant owned the station. On the contrary, the facts stated show simply that the corporation with whom the appellant contracted promised to pay him a designated sum of money, and for that sum became his debtor. The cases of *Lake Erie & W. R. Co. v. Griffin*, 107 Ind. 464, 27 Am. & Eng. R. Cas. 394; *Bloomfield R. Co. v. Grace*, 112 Ind. 128, and cases of like character,—are not in point, for in those cases possession of the complainant's property was taken and held by the railroad company. This case is in no respect different from that wherein one man agrees to build a house for another, for which the other promises to pay a given sum, and a third person becomes the owner of the house by purchase at a sale made upon a decree foreclosing a prior mortgage. In the case supposed we think it beyond contro-

versy that the purchaser could not be held for the debt of the mortgagor to the builder of the house, and the principle which rules the supposed case must determine the actual one. As the appellant has no cause of action the judgment must be affirmed, upon the assignment of cross errors. See authorities cited in Elliott, App. Proc. §§ 417, 418.

Judgment affirmed.

**Foreclosure of Railroad Mortgage—Liability of Purchaser for Debts of Old Company.**—See notes, 30 Am. & Eng. R. Cas. 155; 17 Am. & Eng. R. Cas. 242; 44 *Id.* 72.

**Same—Liability of Purchasers for Claims Accrued Prior to Purchase—Special Limitation.**—A decree of foreclosure and sale made under a railroad mortgage provided that the purchaser should pay off all claims incurred by the receiver and that all such claims shall be barred unless presented six months after the confirmation of the sale. The decree confirming the sale provided that a deed should be given and the purchasers should take the property, the deed to recite that they took it subject to all claims incurred by the receiver; no objection was ever made by the purchasers to the terms of the decree. More than six months after the confirmation a party filed a claim for damages for an injury caused by the negligence of one of the receiver's employees. The purchasers set up in defense the six months limitation. *Held*, that the defense could not be made; the court had discretion to abrogate the six months limitation, and, as the receiver had been discharged, to decree that the purchasers should pay the amount of the claim. *Olcott v. Headrick*, 141 U. S. 543.

**Same—State and Federal Courts—"Successor."**—While a railroad was in the hands of a receiver appointed by a federal court, a decree was made by the supreme court of the state compelling the company "its successors, assigns, grantees and lessees" to operate a certain part of the road. Afterwards the mortgage on the road was foreclosed by decree of the federal court and at the sale thereunder was purchased by a corporation which conveyed to the defendant. Upon an application for an order against defendant to show cause why the decree of the state court should not be enforced against it, it admitted the facts as stated but denied that it was "the successor, assign, grantee or lessee" of the original company. *Held*, that this defense could not avail; the defendant was a successor of the company against which the decree was rendered. Nor could the defendant company defend on the ground that it had leased the line in question to another road and that if the decree were enforced a rental of \$14,000 a year will be lost to it. *State v. Iowa Cent. R. Co.*, (Iowa Oct. 16, 1891) 50 N. W. Rep. 280.

**Foreclosure of Mortgage—Right of Vendor of Rolling Stock Where its Value has Increased Since the Sale.**—In a suit to foreclose a railroad mortgage in which an intervenor claimed title to certain rolling stock as vendor under conditional sale, the evidence showed that the value of rolling stock had increased 10 per cent. since the time when furnished by the intervenor. *Held*, that in determining the sum which the receiver in the suit should pay in order to retain possession of the rolling stock, 10 per cent. should be added to the cost thereof, before deducting the annual percentage for wear and tear. *Central Trust Co. v. Marietta, etc., R. Co.*, 48 Fed. Rep. 875.

**Same—Right of Insolvent Defendant Company to Have Payments Out of its Assets Made to its Attorney and Secretary.**—In a suit to foreclose a mortgage of a railroad it appeared that the company was insolvent, its

property in the hands of a receiver, and its assets insufficient to pay mortgage bonds. The company contested the validity of the bonds and in the course of the suit moved the court to order the receiver to pay certain sums to its counsel for services rendered and to be rendered and also for its office expenses and its secretary's salary, insisting that these payments were absolutely necessary to enable it to defend and to maintain its corporate existence. *Held*, that as such bonds were *prima facie* valid and the assets insufficient to pay them, the holders were entitled to all the assets, and such payments could not be made, since to make them would be to impair the vested rights of the bondholders. *Union L. & T. Co. v. Southern Cal. Motor R. Co.*, 51 Fed. Rep. 106.

**Same—Federal and State Courts—Respective Jurisdiction.**—A company owning a road running through several states purchased a small road lying entirely within a certain state and afterwards mortgaged its whole system including the road newly purchased. Several years afterwards suit was brought in the federal court to foreclose the mortgage, and a receiver was appointed to take charge of the property. Meanwhile a state court had declared the charter of the small road forfeited and had placed its property in the hands of a receiver. This latter receiver petitioned the federal court for possession alleging that the sale of the road to the interstate company was *ultra vires* and void and that the federal court had no jurisdiction over it. *Held*, that this petition merely raised the question of the validity of the sale which might properly be tried in the federal court, and the court would therefore retain possession. The fact that the state statutes provide for the payment of the corporation's debts after its charter is forfeited, and for the distribution of its assets, does not give the state courts exclusive jurisdiction, since these directions will be complied with in the federal court. *Mercantile Trust Co. v. Missouri, etc., R. Co.*, 48 Fed. Rep. 351.

**Same—Power to Sell Lands Not Needed—Consent.**—On foreclosure proceedings, where a receiver has been appointed, but the relative rights of the various parties have not been established, the fact that the mortgages authorize the sale of lands not needed for corporate purposes, and the application of the proceeds by the trustees to the extinguishment of the oldest liens, will not justify such sale by the court, in the absence of consent by all the parties, and the mere absence of counsel from the hearing of a motion for that purpose will not amount to consent. *Bound v. South Car. R. Co.*, (C. C. D. S. Car.) 46 Fed. Rep. 315.

**Same—Liens for Supplies—Priorities.**—Persons who furnish labor, supplies, and materials to a railroad, in order to keep it a going concern, are entitled to payment out of the earnings thereof before the payment of any interest on the mortgage bonds; and if, in a suit to foreclose, it appears that money due upon claims of this nature has been paid out as an interest on the bonds, or for permanent improvements, whereby the bondholders have been benefited, the court will order an amount equal to the sum so diverted to be paid upon such claims out of any earnings in the hands of the receiver, or, failing these, out of the proceeds of the sale. *Finance Co. of Pennsylvania v. Charleston C. & C. R. Co.*, 48 Fed. Rep. 188.

**Same—Lien of Attorney Upon Papers for Services—Priorities.**—The attorney of a railroad company, who in the course of his regular duties has negotiated conveyances of the right of way and has received conveyances thereof, and has also negotiated donations of property for depot purposes and received conveyances thereof executed in his name as vendee, has a lien upon such papers for his salary and legitimate expenditures about the business, and may retain possession of them until such charges are paid. But in the foreclosure of a mortgage of the railroad such lien will not be held to ex-

tend to the *corpus* of the property, or to authorize the payment of his demand out of the funds in the hands of the receiver before the claims of the bondholders are paid. *Finance Co. of Pa. v. Charleston C. & C. R. Co.*, (C. C. D. S. Car.) 46 Fed. Rep. 426.

**Mortgage of Consolidated Railroad—Suit to Foreclose—Right of Stockholders of One of the Consolidated Companies to Intervene.**—In a suit to foreclose a mortgage of a railroad certain persons petitioned to be made parties defendant, alleging that the defendant company was made up of an illegal consolidation of three other companies, in one of which they were stockholders; that they never consented to, or recognized the validity of, the consolidation, and were not bound by it or by the act of the new company creating the mortgage; that the new company "is perhaps concluded by its conduct in the premises from making defense" to the suit; that the original company, of which they were members, had no officer or representative upon whom they could call to make defense for them; and that the counsel for the consolidated company declined to set up the defense which they desired to make. *Held*, that these facts gave no right to intervene as defendants, especially as there was no charge of fraud or collusion; the proper remedy in such a case is by an independent suit. *Central Trust Co. v. Marietta, etc., R. Co.*, 48 Fed. Rep. 14.

## WHITE

v.

WOOD, *et al.*

(*New York Court of Appeals, Jan. 20, 1892.*)

**Railway Mortgage Bonds—Re-organization by Trustees—Issue of Stock to Bondholders.**—Under an agreement between the trustees in a railroad mortgage and the bondholders, the former were authorized to purchase the road at the foreclosure sale and to organize a new corporation, "the stock of such (new) company to be issued to and divided among" the bondholders in proportion to the number of bonds deposited by them with the trustees. The trustees formed the new corporation with a capital stock of \$2,000,000 but the laws of the state creating this new corporation forbade the issue of paid up stock beyond the amount of the accrued cost of the road and such sum as might be necessary to complete it. The trustees issued to the bondholders paid up stock to the amount of the cost of the part of the road completed, retaining the remainder for the completion of the road. In an action to compel the distribution of the remainder of the stock, it appeared from the record that the trustees had acted in good faith. *Held*, that the residue of the stock was properly retained by the trustees.

APPEAL from general term of Supreme Court, first department.

Whiteler H. Peckham, for appellants.

William F. Gaynor, for respondent.

O'BRIEN, J.—The judgment in this case is based upon



tion to do must be regarded as done by the superior himself, and his responsibility is the same as if he had done it in person. The maxim covers acts of omission as well as of commission, and embraces all cases in which the failure of the servant to observe the rights of others in the conduct of the master's business has been injurious," (Cooley, Torts, 534.) as well as those cases in which the servant has failed to perform, refused to perform, or has negligently performed, the duties due from the master to others in the conduct of such business; and the master is primarily liable to others for his own negligence in employing servants who are wanting in the requisite care, skill, or prudence for the business intrusted to them, when, by the exercise of ordinary care, it would have been known; and in regard to passengers whom the carrier has bound itself to carry safely, whether such want of care, skill, and prudence could have been ascertained or not; for, between the two, the carrier, who has made the wrong possible, though innocent in other respects, must pay the damage or suffer the loss. But what the servant thus does without authority must be done in the master's service; must be in the line or within the scope of his employment. Masters "are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them." Lord KENYON, C. J., in *Ellis v. Turner*, 8 Term R. 531-533, as quoted in Bishop on Non-Contract Law, § 612. "So, when a railway company puts a conductor in charge of its train, and he purposely and wrongfully ejects the passenger from the cars, the railway company must bear the blame and pay the damages. As between the company and the passenger, the right of the latter to compensation is unquestionable." Cooley, Torts, (2d Ed.) p. 626, and cases cited. Why? Not because the company authorized it expressly or impliedly, but because it was the duty of the company to treat him properly, and carry him safely; and it makes no difference what was the conductor's motive for doing the act, how exclusively personal it may have been, or how foreign to the master's business then in hand, of transporting the passenger, if the act was in violation of the master's duty to the passenger, which it was the conductor's duty to discharge and perform as the master's servant and in the master's place. And the same principle applies to other acts in the same circumstances, such as assault and battery. *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 588, 12 Am. & Eng. R. Cas. 127; *Bryant v. Rich*, 106 Mass. 180; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 8 Am. & Eng. R. Cas. 354; *Wabash R. Co. v. Savage*,

110 Ind. 156, 28 Am. & Eng. R. Cas. 288. See Thomp. Carr. notes to *Pendleton v. Kinsley*, p. 363. *Harris v. Louisville N. O. & T. R. Co.*, 35 Fed. Rep. 116, was a case of false imprisonment. See case of *Corbett v. Twenty-third St. R. Co.*, 42 Hun (N. Y.) 587, (1886,)—also a case of assault and false imprisonment. Mechem, in his work on Agency, § 740, gives the general rule as follows: "While, as has been seen, it is well settled that the principal is liable for the negligent act of his agent committed in the course of his employment, it has been held in many cases that he is not liable for the agent's willful or malicious act. In the language of Judge COWEN which fairly states the doctrine of these cases, 'the dividing line is the willfulness of the act.' *Wright v. Wilcox*, 19 Wend. (N. Y.) 345. The tendency of modern cases, however, is to attach less importance to the intention of the agent, and more to the question whether the act was done within the scope of the agent's employment; and it is believed that the true rule may be said to be that the principal is responsible for the willful or malicious acts of the agent if they are done in the course of his employment, and within the scope of his authority; but that the principal is not liable for such acts, unless previously expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority,—as, where the agent steps aside from his employment to gratify some personal animosity, or to give vent to some private feeling of his own." See cases cited. Such seems to be the present modern doctrine as to passenger carriers, and founded upon public policy, if not upon the principle already stated.

"False imprisonment is any unlawful physical restraint by one of another's liberty, whether in prison or elsewhere." Bish. Non-Cont. Law, § 206, and cases cited. "False imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing by force or threats an unlawful restraint upon a man's freedom of locomotion. *Prima facie*, any restraint put by fear or force upon the actions of another is unlawful, and constitutes false imprisonment, unless a showing of justification makes it a true or legal imprisonment." Cooley, Torts, 196. "An abuse of a lawful arrest is also false imprisonment; as cruelly treating the arrested person, insulting him, imposing on him undue hardships." Bish. Non-Cont. Law, § 210. "In false imprisonment proper, as distinguished from malicious prosecution, malice is not required," (*Id.* § 212;) but want of reasonable and probable cause is sufficient. "When the officer, acting however honestly, arrests the wrong person, not being misled thereto by the person him-

self, it is a case of false imprisonment." *Id.* § 213. The mistake may be shown in mitigation of damages. See cases in note.

We have seen that it is the duty of the common carrier of passengers to treat his passengers properly and respectfully, and to carry them safely, and, though not an insurer, yet the law, based upon principles of public policy, is strict and exacting in requiring their performance; and surely in this day, when all the world is carried to and fro daily by instrumentalities vast in power and force, and, without constant vigilance and great care and skill, almost as dangerous as forceful, owned by mere corporate entities, public policy is not likely to exact any less stringent rule. The carrier is not only bound to safely carry and properly treat the passenger, but, as far as may be, to keep an orderly and well-regulated house, for such in fact it is in these days, "protecting the passengers from the assaults of fellow-passengers or trespassers during the subsistence of the contract of transportation." *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512; *Thomp. Carr.* 295, and notes. See, also, opinion of SHAW, C. J., in *Com. v. Power*, 7 Metc. (Mass.) 596-601, citing *Markham v. Brown*, 8 N. H. 523. And to enable the company to discharge these duties the more efficiently through its conductor, put as a living, intelligent person to act as its representative in the flesh for that purpose, our statute has enacted that "the conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of such train." Section 31, chap. 145, Code, p. 906, (Ed. 1891,) thus giving him as conductor the shield and protection as well as the authority and power of the state in keeping and enforcing law and order, and protecting persons and property. This is a great thing for him, for his company, for his passengers, for the public at large. For him, not only because he can, in the discharge of his various and often perplexing duties, now speak and act with more confidence with the state at his back, but, as such conservator of the peace, may properly be treated with more indulgence because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made with reasonably probable cause for belief, he will be excused even though it appear afterwards that in fact no offense had been committed. See *Cooley*, Torts, 202. For the corporate master and owner, not only for these reasons, but for the superadded one that its duties to its passengers, its servants, and the public can now be more efficiently performed through its living representative, put in charge for the purpose, as well as making more safe and secure its widely extended property. For the passengers, because their safety

and well-being can be better guarded. And for the state, as interested in the preservation of law and order, as well as in all these things. But there is nothing to indicate that it was the intent of the law-making power to slacken the vigilance, or diminish the responsibility of the common carrier, or render it less liable for failure to discharge its duties than before.

Now, returning to the facts, there is little or no conflict in the evidence, and I have given them with some minuteness and, so far as the conductor details them, pretty much in his own language. We find that, as matter of fact, he had taken charge of the train as such conductor, whether the 30 minutes had fully run out or not. He was on the train, acted and spoke as the one in charge, chided and cautioned Coffey for his drunkenness, had the doors opened, received passengers, and made ready to start, in the mean time sending a subordinate for the police officer to make the arrest. In truth it is said for his defendant company, if not by himself, as matter of complete exculpation of the master, that he was acting as a conservator of the peace under the statute, and therefore could not be acting in any other capacity. He could only be such conservator, as a superadded function to that of "conductor of a railroad train, while in charge of such train." He caused to be arrested and handcuffed, and led through the streets of Huntington, in the open light of day without any reasonable or probable cause a sober and orderly and well-behaved young man, on the train as a passenger who, as he now says, as another ground of defense for his principal, had in his own language done nothing in violation of the rules of the Ohio Railroad Company; done nothing against the property of the company, but had bought his ticket, was quietly seated on the train waiting for it to carry him to Ben Lomond; and it was the duty of the defendant to cause that to be done safely and properly, as it had contracted to do, and it cannot escape liability by laying the fault on its servant.

Company  
liable for  
conductor's  
act.

In *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657,—a suit for an assault committed by the conductor on a lady passenger,—the same defense was made as is set up here,—that it was the unauthorized and purely personal act of the conductor, and not within the scope of his employment. RYAN, C. J., in delivering the opinion, among other things, said: "And is the appellant here to contend that it has no responsibility for the flagrant violation of the contract which the respondent paid it to make and to keep by its sole representative appointed to keep it on its behalf? Like the English crown, it lays its sins upon its servants, and claims that it can do no wrong. We cannot bend down the law to such a convenience.

The appellant tortiously broke this contract as surely as it made it, committed this tort as surely as it made the contract." The willfulness of the servant's act is no excuse so long as it amounts to a breach of the contract. (*Weed v. Panama R. Co.*, 17 N. Y. 362 ; ) nor the fact that the act is wholly disconnected from his duties, and a purely wanton assault. In *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 330, the court held "that the proper rule was that, where the misconduct of the agent caused a breach of the obligation or contract of the principal, the principal would be liable, whether such conduct be willful or malicious or merely negligent." There are many other cases to the same effect, which need not be here cited, for here the wrong complained of was clearly in the line of service. It was done by the servant in those things that related to his duty under the master, and was not the "servant's independent tort, committed outside the sphere of his employment." See *Bish. Non-Cont. Law*, § 635. Personal liberty is a natural right. "And, *prima facie*, any restraint put by fear or force upon the actions of another is unlawful, and constitutes false imprisonment, unless a showing of justification makes it a true or legal imprisonment." *Cooley, Torts*, 196.

In this case the innocence of the plaintiff is shown beyond all question, not only by a trial and acquittal, but by the same evidence given under oath by Thornley and others which was given by him and others without oath to and in the presence of the conductor and police officer before and at the time they were making the arrest, now reinforced by the evidence of the conductor himself; and it must be remembered that Thornley had long known and knew well both plaintiff and Coffey, and was present with the two from the beginning of the difficulty between the conductor and Coffey down to the time plaintiff was led away out of the car under arrest. The conductor says he was so much excited that he could not use his ordinary prudence and carefulness, and thus made the mistake. That he did it by mistake, I think there can be no question. What motive could he have had to treat his passenger, Gillingham, in that way? None whatever, so far as this record discloses. But if he had listened at the time to those who knew, or had used ordinary care to examine for himself, or had taken the hint given him by the officer that he was acting rashly, and making a grave mistake, none would have been made; he would soon have come to his senses. But from some cause he failed to do this, and his mistake was not innocent in the eyes of the law, and the arrest was made without any reasonable or probable cause, of a passenger, whom

it was the company's contract duty to carry safely to the destination mentioned in his ticket, for which very purpose, among others, he was put in charge of the train, so that the act, although in violation of his duty to the carrier as well as to the passenger, was clearly within the scope of his employment, and therefore the master is liable.

The jury fixed the damages at \$1,000, and the trial court refused to disturb the finding. But defendant, by its counsel, claims that the damages estimated should have been limited to the actual money loss sustained by plaintiff for loss of time and actual expenses incurred by him in consequence of his having been put off the train, and that the jury should have been told that they could not give exemplary, vindictive or punitive damages,—terms often used indifferently in describing these damages. The exigencies of the case in hand do not call for any critical examination of the subject. For that I refer to the full and able discussion of the subject by the late Judge GREEN in *Pegram v. Stortz*, 31 W. Va. 220, also published in 7 Am. & Eng. Enc. Law, 448, under the head of "Exemplary damages." "Exemplary damages is the money given to the plaintiff by the jury as compensation for the injury inflicted by the defendant on the mental feelings of the injured person, such as his shame, degradation, loss of social position, and the like, resulting from the tort for which the action is brought." 7 Am. & Eng. Enc. Law, 448. And in actions of tort, when gross fraud, malice, or oppression, or any wanton, willful, and deliberate disregard of the injured person's rights, appears, the jury are not bound to adhere, in computing it, to the determinable money loss or damages, but may give such damages as will be exemplary in keeping others from so doing, and the defendant from repeating like conduct. It may be smart-money as to the defendant, provided it be not an excessive or unreasonable *solatium* to the plaintiff. See 1 Sedg. Dam. (8th Ed.) chap. 11. In this case the plaintiff passenger, entitled to proper and respectful treatment, was surely entitled to exemplary damages for the great indignity and humiliation to which he was subjected in being arrested, handcuffed, and led away without the slightest pretext or cause for it whatever, except that the conductor persisted in closing his eyes and shutting his ears to those who knew, and both showed him and told him, the real offender.

These were the main questions. Others, however, were raised and discussed, which should not be passed by. I need not give the amended declaration. It was in tort for false imprisonment and malicious prosecution, with the usual

Exemplary  
damages.

inducement, of the circumstances, including the contract for transportation, and the demurrer was properly overruled.

The court, at the request of defendant, directed the jury to find in writing upon three particular questions of fact submitted to them under section 5, chap. 131, of the

**Findings of fact.**

**Code:** (1) "Was the arrest of Gillingham the result of an assault with a knife in the hands of one Coffey made upon Ebert (the conductor) while the train was upon the side track, before backing down to the depot for departure?" To this the jury answered, "Yes." This question was immaterial. If true, it was no bar. It constituted no complete defense; and therefore, not being inconsistent with the general verdict of guilty, it could not control the latter, and the court could not accordingly give a judgment on it. (2) Question No. 2 was the same in substance, under a slightly different form, and was answered in the same way, and was properly disregarded by the court in giving judgment, and for the same reason. (3) "Did Ebert (the conductor) have any authority from the defendant company to cause Gillingham's (the plaintiff's) arrest; and, if so, how, when, and by what official of said company was Ebert authorized to cause such arrest?" The jury answered, "Yes; from the Ohio River Railroad Company;" not giving the name of any special official, or the manner or the time of conferring such special authority. As we have already seen, no special authority from any official was needed. The liability of the company grew out of its obligation to answer for any injury inflicted upon the passenger by the willful misconduct or negligence of its servant, who was put in charge of the train for the purpose and with the duty of carrying the passengers safely. This special question also was, therefore, immaterial, and, if it had been answered as to the special official with a "No" instead of a "Yes" it would still have been the duty of the court not to permit it to control the general verdict. *Kerr v. Lunsford*, 31 W. Va. 659; *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.*, 34 W. Va. 155, and the discussion of the subject and authorities cited by *LUCAS, J.*, in delivering the opinion of the court; and *Peninsula Land Transp. & Manuf'g Co. v. Franklin Ins. Co.*, 35 W. Va. 666, (decided at this term.)

Various exceptions were taken by defendant during the progress of the trial. One was permitting testimony to go to the jury of what occurred to the plaintiff after he was arrested and removed from the car. Plaintiff, as a witness, states in substance that the officer, Beatty, took plaintiff by way of Beatty's house to the office of Squire Taylor, where he was tried and acquitted.

**Exceptions to evidence.**

To that evidence I see no objection. When the conductor was on the stand as a witness for defendant counsel for defendant several times asked the witness for whom he was acting when he pointed plaintiff out to the police officer as the one to arrest, and whether or not this was a personal matter between the witness and the plaintiff; whether he was acting in his own behalf or in his official capacity; and, if any, what authority he had for arresting or causing plaintiff to be arrested; or whether he was then acting within the scope of his authority as conductor of that Ohio River train; all of which the court for a while steadily refused to permit to be answered. But the court, during the trial, did permit the witness to answer that there was no solicitation from any one to make the arrest, "only himself;" that his pointing out plaintiff, etc., "was personally done;" that he "was off duty at the time the arrest was made;" "that he honestly believed that Gillingham was the man that cut at him with the knife when he pointed him out to the policeman." These questions and answers were permitted to go to the jury, being substantial answers to the questions before ruled out, so that we need not, at this point at least, consider these exceptions further.

Two instructions were given on motion of plaintiff,—No. 1 and No. 2. Seven were asked for by defendant. Nos. 1, 2, and 4 were given, and Nos. 3, 5, 6, and 7 were refused. Instructions given on motion of plaintiff were as follows: "No. 1. The court instructs the jury that if they believe from the evidence that the plaintiff without just cause was arrested after he became a passenger on one of the defendant's trains, and during the time that he was on such train, either by the conductor in charge of said train or by the policeman, Beatty, by order of the said conductor, that the act of the conductor, or of the said policeman acting under the orders of the said conductor, was the act of the defendant. No. 2. The court instructs the jury that, if they find the defendant guilty, they are, in estimating the plaintiff's damages, at liberty to consider the expense and loss of time, if any, incurred by the plaintiff; also the bodily and mental pain and anguish resulting from the defendant's acts as proved; and for the outrage and indignity and humiliation put upon the plaintiff to allow such damages as, in the opinion of the jury, will be a fair and just compensation for the injuries sustained, not exceeding the amount sued for." Instructions on behalf of defendant, granted by the court, are as follows: "No. 1. The court instructs the jury that the plaintiff cannot recover in this case unless the acts done by Ebert in causing the arrest of the plaintiff were

Instructions  
to jury.



within the scope of his employment by the defendant railroad company; and such acts, to be within the scope of his employment, must be such as he would be usually and naturally called upon to do while discharging his duties as a railroad conductor in and about the business of the defendant railroad company. No. 2. The court further instructs the jury that it is not sufficient that the acts complained of were done during the time of the conductor's employment by the railroad company, or at the place where his duties called him to be. There must be something more, something which he was authorized by the defendant company to do, or which he did do while acting as such conductor, in the scope of his duties and employment." "No. 4. That, unless the act done by the conductor in causing the arrest of the plaintiff was authorized by the railroad company, or was properly and legitimately within the scope of his employment, you must find for the defendant." Instructions asked for by defendant, but refused by the court, were as follows: "No. 3. The fact that Ebert was employed by the defendant as a conductor of the passenger train upon which the plaintiff intended traveling is not sufficient evidence that he was authorized or employed to do the acts complained of, nor is that fact of itself sufficient to make the defendant liable for the acts complained of." "No. 5. That, if you believe from the evidence in this case that Ebert caused the arrest of the plaintiff while acting for himself, and upon his own authority, for his own personal safety, without any direction or authority from the railroad company for so doing, you must find for the defendant. No. 6. The court instructs the jury that it was not lawful for the policeman to make the arrest without a warrant therefor, and that the defendant railroad company could not have legally procured the plaintiff's arrest in the manner in which said arrest was made, and that the defendant is not liable for the acts of Ebert which said company itself could not have lawfully done. No. 7. The court instructs the jury that, if they believe from the evidence in this cause that the plaintiff is entitled to recover anything, then, in estimating the damages, you are limited to the actual damage sustained by the plaintiff for loss of time and actual expenses incurred by him in consequence of his having been put off of the train, and you cannot, in this case, give exemplary, vindictive, or punitive damages." I can see no objection to the instructions No. 1 and No. 2, given on behalf of plaintiff, if read in connection with No. 1, No. 2, and No. 4, given on behalf of defendant, of which there is no complaint. They are in harmony with, and substantially propound, the law, as we think, correctly. Plaintiff's No. 2 was approved

in *Ricketts v. Chesapeake & O. R. Co.*, 33 W. Va. 433, 41 Am. & Eng. R. Cas. 42. They mean that, if plaintiff was a passenger on defendant's train, and during the time he was on the train to be carried to his proper station on the road he was arrested or caused to be arrested without just cause by the conductor in charge of the train, and that such act was within the scope of the conductor's employment, then such arrest would be the act of the defendant; that is, an act for which it might be liable. No serious objection can be made to instruction No. 2, given for plaintiff. It is drawn on the theory of exemplary damages as a *solatium*,—damages restricted to what would, in the opinion of the jury, be a fair and just compensation for the injuries sustained or inflicted. *Pegram v. Stortz*, 31 W. Va. 220. Instruction No. 3 of defendant was virtually given in giving defendant's instructions No. 1, No. 2, and No. 4, so that, whether right or wrong, defendant has no ground of complaint in its refusal. The same may be said of instruction No. 5, asked by defendant. It had already been given, and no complaint in this court is made by plaintiff. Defendant's instruction No. 5, taken as a whole, is not correct, for, if the arrest could not lawfully be made or caused to be made by the conductor without a warrant, that might add to the wrong, but would not relieve the defendant from liability for the false and groundless imprisonment of a passenger by the conductor in charge of the train, acting within the scope of his employment. The refusal of defendant's instruction No. 7 has already been disposed of by what has been said on the subject of damages and in discussing plaintiff's instruction No. 2. In conclusion, we see no reason why we should set aside the judgment and verdict and award a new trial.

The judgment complained of is affirmed.

**Liability of Carrier for Willful or Malicious Acts of Servants towards Passengers.**—See *Dwinelle v. New York Cent. & H. R. R. Co.* (N. Y.) 44 Am. & Eng. R. Cas. 384, note 391; *Dillingham v. Anthony* (Tex.) 37 *Id.* 1; *Fick v. Chicago & N. W. R. Co.* (Wis.) 34 Am. & Eng. Cas. 378, and cases cited in note, 380.

## NORTHERN PACIFIC R. CO.

v

BARDEN *et al.*

(U. S. Circuit Court, D. Montana, June 12, 1891, 46 Fed. Rep. 592.)

**Land Grants—Exclusion of Mineral Lands.**—An act of Congress granting land to a railroad company provided "that all mineral lands be, and the same are hereby, excluded from the operation of this act." *Held*, that the exception applied only to "known" mineral lands.

**Same—Same.**—The time when lands must be known to be "mineral," in order to exclude them from a grant of land made to a railroad company, is the date when the line of the railroad becomes definitely fixed and a plat thereof is filed in the general land office.

KNOWLES, J., *dissenting*.

At law. On demurrer to complaint.

Demurrer to a complaint in an action to recover possession of portions of section 27, township 10 N., range 4 W., P. M. Montana. Plaintiff alleges its incorporation under the act of congress of July 2, 1864, (13 St. 365,) for the purpose of building the Northern Pacific Railroad; that by that act there was granted to plaintiff every alternate section of public land not mineral, designated by odd numbers to the amount of 20 sections per mile, on each side of such railroad line as said company might adopt through the territories of the United States, whenever, on the line thereof, the United States had full title, not reserved, sold or granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time when the line of said road shall be definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; also other provisions of the act; that plaintiff duly accepted the terms and conditions of said act in the mode prescribed by law, within two years after the passage of the act, to wit: on December 24, 1864; that the *general* route of said road extending through the state of Montana, was duly fixed, on February 21, 1872; that the said lands in question in said section 27 are within the 40 miles of the line of said railroad as so fixed, and were on said February 21, 1872, public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights; that at the date of said act, July 2, 1864, and the date of fixing said line of general route, to wit: February 21, 1872, no part of said land in question was *known mineral land*,

but said land was more valuable for grazing than for mining purposes, and that no part of said land was within any *exceptions* from said grant; that afterwards, on *July 6, 1882*, *plaintiff definitely fixed* the line of said railroad *extending opposite to and past said land*, and *filed a plat thereof*, in the office of the commissioner of the general land-office; and that said land is within 40 miles of said line of railroad as so *definitely fixed*; that thereafter, the plaintiff duly constructed said portion of said road and telegraph line over, and along the line of definite location so fixed, and upon reports of commissioners, as required by said act, the president of the United States duly accepted said railroad and telegraph line so constructed and completed; that at the date of so definitely locating said line of railroad and filing the plat thereof in the office of the commissioner of the general land-office, on *July 6, 1882*, the said land was *not known mineral land*, and was more valuable for grazing than mining purposes, and that said land was on said day public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights; that said lands were surveyed in 1868 and township plat filed in the proper land-office on September 9, 1868; that the character of said land was ascertained and determined, and reported and shown upon said plat to be agricultural and not mineral land, and that said determination, report and showing have continually remained and they still remain of full force and effect; that after the completion of said railroad aforesaid, the said plaintiff listed said lands with other lands as a portion of said grant, and thereafter on November, 1886, duly filed said list in the district land-office at Helena, and paid the receiver of said land-office the lawful fees for filing such list; and said register and receiver duly accepted and allowed said list; and certified the same to the commissioner of the general land-office; and said list has since remained, and it is now of record in said general land-office, and no part of said fees has been returned or tendered to said plaintiff; that at the time of the acceptance, approval and allowance by said district land officers, and at all times prior thereto, no part of said land was known mineral land, or was of greater value for mining than for grazing or agricultural purposes, or town-site purposes, *or had any value for mining purposes whatever*; that during the year 1888 certain veins or lodes in place of rock in place bearing gold, silver and other precious metals were discovered in said land, and thereafter certain parties named, being citizens of the United States, without the consent and against the will of plaintiff, entered upon said land and made loca-

tions of said veins or lodes, to wit; on June 20, 1888, the Vanderbilt Quartz Lode Mining Claim on lot 68, on August 10, 1888, the Four Jacks, N. Y. Central, and Hudson River Quartz Lode Mining Claim, number 72, 74, and 75, respectively; and on May 9, 1889, the Chauncey Depew Quartz Lode Mining Claim on lot number 73 of said lots, being within the said disputed premises; that said defendants are in possession of said lots 68, 72, 73, 74, and 75, claiming title under said locations through mesne conveyances from said locators, and they have been and now are extracting ore therefrom; and that although title has vested in said plaintiff, under said act of congress, and the acts performed by it as alleged, and plaintiff has thereby become the owner of said land, the United States have failed and refused to issue a patent to said plaintiff, as required by said act. The value of the disputed premises is alleged to be \$6,000, and of the ore extracted, over \$100. Plaintiff prays judgment for possession of the premises and of the value of the ore extracted.

*F. M. Dudley and Cullen, Sanders & Shelton*, for plaintiff.

*Adkinson & Miller*, for defendants.

Before SAWYER, Circuit Judge, and KNOWLES, District Judge.

SAWYER, J.—The complaint undoubtedly states many facts, not necessary to be stated in a complaint to recover land.

It not only sets up the probative, as well as, the ultimate, facts necessary to be stated to make a good complaint, but the facts which the defendants will rely upon to defeat the action. The object doubtless, is, to state all the facts, as they really exist, or are supposed to exist, with a view to having the rights of the parties on that state of facts determined in the simplest form upon a demurrer to the complaint. Although somewhat cumbersome in a pleading in an action at law, I see no objection, the defendants making none, to taking the course pursued by plaintiff in this case, provided it has set out sufficient facts, to show upon the whole case, a good cause of action. The defendant has not moved to strike out any part, as being irrelevant or redundant, but has met the case fairly by a demurrer, both parties, doubtless, being desirous of having their rights determined in the shortest, easiest, and least expensive manner.

Taking all the facts as alleged in the complaint, I think there can be no doubt, that the title to the land in controversy is in the plaintiff, unless the allegation of the discovery of mines in 1888, is sufficient to show that the land containing them is mineral, within the meaning of the term as used in the act of congress; and, that the lands are, therefore, within the exception from

Sufficiency of  
complaint.

Meaning of  
term "Min-  
eral lands."

the grant to plaintiff of mineral land. This being the case it becomes necessary to determine, definitely, what congress meant by the words "not mineral" in the first part of section 3, and the words "mineral lands," in the clause "that all *mineral lands* be, and the same are hereby excluded from the operation of this act," in the third proviso of the same section. And the meaning of these terms is the great question, so elaborately and ably discussed by counsel of the respective parties, upon which the decision of the demurrer, it is conceded, must turn. For the purposes of this decision, I shall assume, that the complaint shows a discovery of valuable mines in 1888, when the several claims alleged were located—such as would have taken them out of the grant, had they been *known*, at the time when the line of the road was definitely fixed.

This question is not new to the circuit court for the northern district of California; or to the state courts of California and Nevada, as a reference to the decisions of the supreme courts of these states will show. The circuit court had occasion to consider the precise point, fully, and directly decide it in *Francoeur v. Newhouse*, 14 Sawy. (U. S.) 351, 40 Fed. Rep. 618, 40 Am. & Eng. R. Cas. 439, arising under the legislative grant to the Central Pacific Railroad Company, of July 1, 1862, (12 St. 489.) The words of exception in the act are "that *all mineral lands* shall be excepted from the operation of this act." After mature consideration, in that case, it was held, the circuit and district judges concurring, that, the meaning of the term, "mineral lands," as used in the exception, is, lands that were not only mineral, in fact, at the time the grant attached and took effect, but that they must be lands that were *known* to be mineral, or at least, such as were apparently mineral, and generally recognized as such, 14 Sawy. (U. S.) 355, 40 Fed. Rep. 622, 40 Am. & Eng. R. Cas. 439. The court there said: "The next question is, did the land in question pass, by the grant of 1862, perfected in 1866-67, in which a gold mine was discovered in 1883, twenty-one years after the grant attached, by the filing of a plat of the general route of the railroad, and the withdrawal of the lands in pursuance of the statute, by the secretary of the interior, and more than seventeen years after the completion of the road, and its acceptance by the president; and more than sixteen years after the final survey, and report of the lands as agricultural, and not mineral. The parties to this grant, both the United States and the grantee, must be presumed to have contemplated a grant in view of the condition of the lands as they were known, or appeared to be, at the time the grant took effect. In the excep-

Authorities  
reviewed.

tion of 'mineral lands' from the grant, congress could not have contemplated that the discovery of a paying mine, fifteen or twenty years after the making of the grant, and the performance of all the conditions by the grantee, required to perfect the title, and render it irrevocable, should vitiate the grant. If so, then such a discovery fifty, or one hundred years after, would effect the same result. In granting the public lands, congress must be presumed to deal with them in view of the conditions as they are known, or supposed to be, at the time. Exceptions must be presumed to refer to matters that are readily apparent upon inspection. Any others would be altogether too indefinite to be valid. The conditions constituting the exception ought, certainly, to be ascertainable at the time the grant takes effect, or they ought not to be operative; otherwise, the greatest confusion and inconvenience, public and private, must, necessarily, result. The grant should point out what is granted in such certain terms, that the grantee may be able to ascertain by inspection, and know at the time the location is, definitely, fixed, and it becomes operative, what specific tracts of land are granted, and what are excepted from the grant. These lands soon after the grant, were conveyed, in trust, under authority of the law, as security for the bonds issued, out of the proceeds of which the road was constructed; and the proceeds of these sales are devoted by the trustees to the redemption of the bonds. Is this security to be impaired, or destroyed, by taking from the operation of the grant all lands in which at any future time gold, or other valuable metals may be discovered? If so, all of the lands may, sooner or later revert to the United States, and bondholders, and those, who in good faith, have purchased the lands of the company, without being aware of the mines secluded in their lower depths, will be largely injured. These words 'mineral lands,' as used in the act, must be construed in a practical sense—as practical men would use them in contracting about them—must be construed with reference to their present known, or at least, obviously apparent, condition." 14 Sawy. (U. S.) 355, 356, 40 Fed. Rep. 620, 621, 40 Am. & Eng. R. Cas. 439.

The circuit court had before made, substantially, the same ruling in *Cowell v. Lammers*, 10 Sawy. (U. S.) 257, 21 Fed. Rep. 200, and in *Pacific Coast Min. & Milling Co. v. Spargo*, 8 Sawy. (U. S.), 645, 16 Fed. Rep. 348. The supreme court of the United States, although the precise question had not been necessarily presented, had by implication held the same way in the several cases referred to in the decision in *Francoeur v. Newhouse*; cited. Upon further consideration, I am still satisfied, upon principle, with the ruling in those cases, and

think, that to hold otherwise, would be disastrous to the great interests of all the states having mines of the precious metals, and to none more so than the state of Montana.

The defendants' counsel assail the decision in *Francoeur v. Newhouse*, and insist that the title to no land which, *in fact*, contained valuable mines secreted in its lower depths at the time the grant attached to the specific lands and became perfect, passed to the company under the railroad grant, though the existence of the mineral was unknown, and unsuspected, at the *time*, and there was nothing to indicate that any mine was there—even though the existence of the mine could not by reasonable diligence have been ascertained. And one of the senators from Montana, in an elaborate speech in the senate during a session of the last congress, criticising the opinion in *Francoeur v. Newhouse*, with great ability supported the same view. Said he, in the course of his speech: "If one thousand years hence, a mine is discovered in an odd section of land which it will pay to work, thereby it will be demonstrated that on the 2d day of July, A. D. 1864, *congress had that particular land in view*, when it said 'we except that mineral land out of the grant,' and that it not only then becomes, but it is thereby demonstrated that it has always been, during the thousand years the property of the United States." 21 Cong. Rec. p. 10,946. And a senator from California, a most skillful mining expert, and a large owner of mines in Montana, interrupted the senator's speech with the observation, "*In a thousand years from now, I have no doubt mines will be found in many of those lands.*" *Id.* 10,947. Either the doctrine of *Francoeur v. Newhouse*, or that stated by the senator from Montana, as quoted, must be the true doctrine. There is no middle ground upon which to stand. No middle line can be drawn, and statutes of limitations do not run against the United States.

Nearly all statutes require construction. Such is the imperfection of the human intellect, and human language that it is difficult, if not impossible, to draft an act, that shall, exactly, cover every possible case contemplated by the author, and nothing more; and that his intent shall be apparent to every intelligent mind. The statute of frauds of England, drawn by one of England's ablest lawyers, is a good illustration. It is said by English law-writers, that it has required a great many more suits to settle the meaning of the statute of frauds, than there are words in the statute. This act of congress evidently requires construction, otherwise there could be no possible ground for difference of opinion as to its meaning among, reasonably, intelligent persons. And it must receive a rea-

The reasonable construction of the statute.



sonably sensible construction; a reasonably practical construction; a construction that will enable reasonably intelligent men to determine at the time the grant attaches, what was granted, and what excepted from the operation of the grant; a construction that will afford reasonable certainty, as to land titles. A meaning must be given to it, that reasonably intelligent practical men would be likely to *deliberately contemplate* in passing the act. Such a construction I conceive was given to the Central Pacific grant in *Francoeur v. Newhouse*. But the construction urged by the senator, and counsel in this case, would be unreasonable in the extreme, and *utterly impracticable and absurd in its consequences*—a construction as it appears to me, that no sensible practical man could ever *deliberately contemplate*. It would be absolutely destructive and subversive of all titles to land in the state of Montana, and all new states wherein are similar grants; or, at least, destructive and subversive of all confidence in and security of titles. A severer blow could not well be struck at the interest and prosperity of the state, at large, of Montana, and other states similarly situated, than to adopt that construction, and thereby destroy all confidence in titles to land. Nothing is more conducive to the prosperity of a state, than unassailable land titles, and a feeling of confidence, and a sense of security in such titles. Adopt the construction insisted upon, and no man from Lake Superior to Puget sound, within the exterior bounds of the railroad grant, whether on the odd, or even sections, would know whether he has a title to land purchased either from the government or the railroad company, until a mine either has been, or shall hereafter, at some time in the future more or less distant, be discovered on it, when he will know for the first time, that he has no title. Indeed this state of things would not be confined to the lands, of the railroad grants, but would extend to all lands in the state. Mineral lands have always been, and they are, now, except and reserved from pre-emption, homestead entry, and all other ordinary modes of disposition except congressional, in substantially, the same language, as that in the railroad grant. Every patent issued for mineral lands to a pre-empter, homesteader, or other purchaser, *within the meaning of the exception* is utterly void and passes no title, at least, upon a direct, and not collateral attack. This is conceded by the senator from Montana, and must be by counsel. They all stand upon the same footing with the railroad company, and its grantees, except, that, the latter can do without a patent, as the title passes irrevocably by the congressional grant, and the performance of the conditions subsequent. The patent adds

nothing as a title. It is only a convenient instrument of evidence, in the language of the statute "*confirming* not transferring to said company the right and title to said land."

It does not seem possible that congress, deliberately, intended to leave the titles to all lands in the new states in the state of such lamentable *uncertainty*,—a condition of things utterly destructive to the interests, and obstructive of the prosperity and progress of those states. The mining interests, whatever the case may now be, will, ultimately, become one of the least important. If congress had intended such unnatural and undesirable results, it could have easily expressed its intention in unmistakable language. It provided no means, and no tribunal to determine, upon examination for the purpose, what lands were mineral, within the meaning of the act. It did not require the railroad company, or anybody on behalf of the government, to prospect the lands to ascertain what were mineral. And had it done so, in most instances it would have been unavailing, so far as ascertaining the real condition of the land is concerned. Repeated prospecting, at different times, and, by different parties, in practical work, is often required to disclose a mine. Without any provision for, positively, determining what lands are mineral, for the purposes of the act, at the time the grant attaches, there can be but one reasonable and safe rule, and that is to exclude those which are known to be mineral, or which upon inspection can be readily ascertained to be mineral. The odd sections are *the subject matter of the grant and the mineral lands in the odd sections are the exceptions*. The latter are taken out of the former. Now, the exceptions should be readily identified by inspection. If they cannot be identified by inspection, they are too indefinite and uncertain to be valid, and they must be void for uncertainty. The exception must be specifically pointed out, so that it can be readily ascertained. Exceptions are strictly construed. As an illustration, take a case on a section of the road where the line of the road is definitely located; the road is finished, and all the conditions subsequent are fully performed, the road accepted, and the title to whatever is within the grant, be it more or less, irrevocably vested in the railroad company. The lands are surveyed. So far as can be known by inspection and superficial examination, the lands appear to be timber lands, agricultural lands, or grazing lands, and they are in good faith purchased as such from the railroad company, and occupied as such by the purchaser. Are these lands, so situated, against the will of the purchasers open to wandering prospectors to enter at will upon them, dig up the earth, sink shafts, run drifts, tunnels, etc., to see if they can

find a mine? And failing to find a mine, is the land open year after year for other bands of prospectors to enter and repeat the performance *ad infinitum*? And should a mine, at last, after years of prospecting be found, is the purchaser to have his land taken from him on this exception? Yet such must be the consequence of the construction insisted upon by the defendants. If one quarter section is thus open to exploration, and the title thereto liable to be thereby defeated, by a discovery of a mine at any time, no matter how long, in the future, then every foot of land within the limits of the railroad grant, and even outside these limits, from Lake Superior to Puget sound, is in the same situation, and the title liable to be defeated in the same manner. No man can ever know whether he has a title or not, until a mine is discovered, when he learns that he has no title, but that the land belongs to the United States. I cannot bring my mind to believe it possible, that men of the intelligence and sound sense of those who constitute the senators, and members of the house of representatives in congress, could have *deliberately and knowingly intended or contemplated any such result*. And what adequate object is to be attained by such a construction as will destroy titles and be subversive of all confidence in titles to land in all these new states? For whose benefit is this extraordinary and hurtful condition of things to be imposed on the new states? Is it, that the government may obtain the insignificant sum of \$6 per acre for a small strip of land here and there at long distances apart, not exceeding 1,500 feet long by 600 feet wide? Or is it to give a preference to purchasers at that insignificant price, over permanent settlers, who have already purchased, paid for and improved lands in good faith, to a comparatively few nomadic prospectors, who remain at the same place but a short time.

Should it turn out in course of time, that indications of mines appear, the owners will be quite as likely to prospect for and discover any mine, that may be concealed in the depths of the earth there, as the professional prospectors; and the country, at large, will, in the end, be equally benefited by the result. Is there any object to be accomplished by such an unreasonable, and impracticable construction of the grant as is claimed for it, leading to such absurd consequences, that will compensate for the great wrong and injury that must, necessarily, be inflicted on the new states by removing all grounds for confidence in land-titles? When a dispute arises as to whether the land was *known* mineral land when the grant attached, it may always be safely intrusted to a jury to determine the point. As an instance see the special verdict

and charge of the court on the trial of this same case cited of *Francoeur v. Newhouse*, 14 Sawy. 600, 43 Fed. Rep. 236. When the United States made the railroad grant, in order to secure the construction of that great transcontinental road through thousands of miles of a comparatively unsettled region, it intended to offer something *substantial* as an inducement. It *gave* nothing, for as usual, it doubled the price of all alternate sections, and, by the completion of the road made a market for these lands at the enhanced price. A large development of the resources of the country was also thereby induced. Besides the government saved millions in the cost of transporting the mails, military forces, supplies, etc. For the United States, now, years after the road has been built, and been in successful operation, to insist upon the construction maintained by defendants is to discredit all the titles of the railroad company, and of those holding titles under it; to throw insuperable obstacles in the way of selling these lands by thus discrediting the titles, and do thereby deprive the company of the substantial aid, which it had reason to believe it was to receive upon the performance of the conditions of the contract on its part. There can, possibly, no benefit result to the United States, or to any persons, or classes of persons, designed to be favored thereby, by the construction of the act of congress insisted upon by defendants, that will at all compensate for the wrong to the railroad company and its grantees, occasioned by discrediting these titles, and the blight put upon the prosperity of all those new states, by destroying and subverting all grounds for confidence in the land-titles of those states.

I am, myself, still satisfied with the rule laid down in *Francoeur v. Newhouse*. The court did not, it is true, pass upon the Northern Pacific grant, but it did construe substantially, the same language in a strictly cognate, and analogous provision, and I do not, myself, see how it can hold differently with reference to the railroad grant now in question, without overruling its prior decision. But the supreme court of the United States, in *Davis v. Weibbold*, 139 U. S. 507, a case but recently decided, has, as it appears to me, authoritatively, decided the question now involved, in strict accordance with the foregoing views. But for the fact, that it has been questioned by counsel, and my associate, whether this ruling, because arising under a town-site act, and not a railroad grant, is applicable to the case in hand, I should myself have supposed that the point was not open to any further doubt or discussion. Had it not been for this contention on their part I should have deemed it necessary, only, to refer to the case, and leave the matter there

*Davis v.  
Weibbold  
reviewed.*

without further history of the question, and the prior discussion upon it, or further argument. The plaintiff in that case, relied upon a patent for a mine, bearing date January 15, 1880. The defendant upon a prior patent, issued under the town-site act, for the town-site of Butte, in Deer Lodge county, Montana, dated September 26, 1867, and conveyances from the patentee to the defendant. The latter being the earlier patent contained the clause, that "*no title shall be hereby acquired to any mine of gold, silver, cinnabar, or copper.*" The town-site act, under which the patent issued, provides that "*no title shall be acquired,*" under its provisions, "*to any mine of gold, silver, cinnabar or copper.*" (Rev. St. § 2392.) And the general statute also provides: that "*in all cases lands valuable for minerals shall be reserved from sale, except as otherwise directed by law.*" Section 2318. At the trial, after introducing this patent for the town-site and subsequent conveyance to him, defendant offered to prove by sundry witnesses that, "*at the time the patent to the town-site was issued, the premises embraced by the Gold Hill lode were not known to be valuable for minerals of any kind.*" Objection was made to this evidence on the ground that the patent to defendants *proved* that the premises in fact contained valuable minerals, and therefore, could not under the statute be granted by patent for a town-site, which objection was sustained, an exception entered, and an appeal thereon taken. The question before the supreme court, and upon which the decision turned, was, whether the provision of the statute, that "no title shall be acquired" under the act "to any mine" merely, meant "any *known* mine;" or in other words, whether if there was no "*known* mine" on the land at the date of the patent, a mine *existing in fact*, but not discovered till some years afterwards, passed by the patent, notwithstanding the express prohibitory provision in terms so broad and comprehensive, of the statute? Or whether the provision only meant "*known* mine?" And the supreme court held that it was limited to *known* mines, and that the title to a valuable mine *not known* at the date of the patent, that is to say when the grant attached to the land, did pass under the patent, notwithstanding this prohibitory provision, so comprehensive in its terms, and, that, there was nothing left in the government to pass under the subsequent patent to those who had discovered the mine after the issue of the first patent. The court, consequently, held, that the exclusion of the evidence offered to prove that there was no "*known* mine" at the date of the patent, was erroneous; and it reversed the judgment on that ground alone.

It is urged, in this case, that to hold that a mine must have been *known* to exist at the date, when the railroad grant at-

tached, in order to exclude it from the grant, is to unreasonably and without authority, introduce into the statute the word "known." If that be so, then the same must be true as to the provision of exception or exclusion in the town-site act, that "no title shall be acquired" under its provisions "to any mine of gold, silver, cinnabar or copper," construed by the supreme court, in *Davis v. Weibbold*. Will it be seriously said, that the supreme court unwarrantably introduced the word "known" into that act, thereby largely limiting the scope of the exception, and largely enlarging the scope of the granting power of the act, *as intended by congress*? If this is the result, it was not attained, and this construction of the act, was not adopted, by any hasty ill-considered action of the court, for that tribunal deliberately reached its conclusion "after much consideration." Says the court: "*When the entry of the town-site was had, and the patent issued, and the sale was made to the defendant of the lots held by him, it was not known—at least it does not appear that it was known—that there were any valuable mineral lands within the town-site, and the important question, is, whether in the absence of this knowledge the defendant can be deprived under the laws of the United States of the premises purchased and occupied by him because of a subsequent discovery of minerals in them and the issue of a patent to the discoverer. After much consideration we have come to the conclusion that this question must be answered in the negative.*" It is true that the language of the Revised Statutes touching the acquisition of title to mineral lands within the limits of town-sites is very broad. The declaration that 'no title shall be acquired' under the provisions relating to such town-sites, and the sale of lands therein 'to any mine of gold, silver, cinnabar, or copper; or to any valid mining claim or possession held under existing laws,' would seem on first impression to constitute a reservation of such mines in the land sold, and of mining claims on them, to the United States; but such is not the necessary meaning of the terms used; in strictness, they import only that the provisions by which the title to the land in such town-sites is transferred shall not be the means of passing a title also to mines of gold, silver, cinnabar, or copper in the land, or to valid mining claims or possessions thereon. They are to be read in connection with the clause protecting existing rights to mineral veins; and with the qualification uniformly accompanying exceptions in acts of congress of mineral lands from grant or sale. Thus read they must be held, we think, merely to prohibit the passage of title under the provisions of the town-site laws to mines of gold, silver, cinnabar or copper which are known to exist, on the issue of the town-site patent,

and to mining claims and mining possessions, in respect to which proceedings have been taken under the law or custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable." 139 U. S. 518.

The closing paragraph shows that the court did not consider itself as limiting its construction to the town-site act, and such provisions, only, as have been here seriously contended, whether correctly or not, were alone *in pari materia*. It shows that the court considered the ruling as applicable to "grants for the construction of public buildings: *in aid of railroads and other works of internal improvements*," as well as to pre-emption, town-site, etc., grants. The cases cited from the state, and circuit courts of the United States, are nearly all cases of railroad grants, and the long citation, with approbation, from *Cowell v. Lammers*, 10 Sawy. (U. S.), 246, 257, 21 Fed. Rep. 200,—a case arising under a railroad grant,—contains the passage laying down the rule as now established by the supreme court in the case cited, to wit: "By the words '*mineral lands*' must be understood lands *known* to be such, or which there is satisfactory reason to believe are such at the time of the grant or patent." After citing numerous rulings of the departments, the uniform decisions of the state and circuit courts, and *its own implied recognition of the rule as stated in Cowell v. Lammers*, and now adopted in *Davis v. Weibbold*, where the decision of the point, as it is the great issue in the case, could not be avoided, the court proceeds: "In connection with these views it is to be borne in mind also, that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the public lands, by giving titles to the lands occupied by them, and thus induce them to erect suitable buildings for residence and business. Under such protection many towns have grown up on lands which previously to the patent, were part of the public domain of

the United States, with buildings of great value for residence, trade and manufacture. It would be in many instances a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and being thus subject to indiscriminate invasion, the land would be to one having the title, poor and valueless, just in proportion to the supposed richness and abundance of its products. *We do not think that any such results were contemplated by the act of congress or that any construction should be given to the provision in question which would lead to such results. Our conclusion as already substantially stated, is that congress only intended to preserve existing rights to known mines of gold, silver, cinnabar or copper, and to known mining claims and possessions, against any assertion of title to them by virtue of the conveyances received under the town-site act, and not to leave the titles of purchasers on the town-site to be disturbed by future discoveries.*" 139 U. S. 525. These observations as to the great impediment which the construction insisted upon by defendants, would throw in the way of the prosperity of towns, apply, as we have already seen, with, at least, equal if not greater force with reference to the obstruction to the progress and prosperity of the state at large, should that construction be adopted as to the railroad grants in question.

If the decision in *Davis v. Weibbold*, does not, strictly, apply to, and, fully, cover the question we are now called upon to decide, I confess I do not know to what it does apply, except to another case arising under the same town-site act, wherein the mines were discovered, located, and patented years after the issue of the patent to the town-site. The court intimates no such limitation. It refers to the various forms of the exception in the various acts making grants for *public improvements, universities, railroads, and acts excluding mines from preemption, and homestead acts, etc.*, and cites the decisions arising under them all, tending in the same direction, as though they all stood upon the same footing, as they, evidently, do. Each only provides for carrying out the public policy of the nation to exclude mineral lands from the operation of all these statutes. Though differently expressed, in the different acts, they all were intended to accomplish the same object, and all mean the same thing. What difference



can there be in the meaning of the following phrases found in different acts? "That all mineral lands, be and the same are hereby excluded from the operation of this act." N. P. Co. grant act, (13 St. 367, § 3.) "That all mineral lands shall be excepted from the operation of this act." C. P. R. Co. grant act, (12 St. 492, § 3.) "In all cases, lands valuable for minerals shall be reserved from sale, except as otherwise, expressly, directed by law." Rev. St. 2318. "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper." Town-site act, (Rev. St. 2392.) "No lands on which are situated any known salines or mines shall be liable to entry under and by virtue of the provisions of this act." Pre-emption law of 1841, (5 St. 456, carried into Rev. St. § 2258.) Now all these acts with reference to the questions now under consideration appear to me to be *in pari materia*, and I am satisfied that they were intended to carry out the same line of public policy, and were intended to mean the same thing. The first act of 1841, says "*known salines or mines*;" and such, doubtless with reference to mines was what was intended by the subsequent acts. If there is any difference in the other provisions on this point, the town-site act is stronger against the construction adopted by the supreme court than those in the railroad acts, as it forbids the acquisition of title "to *any* mine of gold," etc.,—no *one* mine can pass. But the same constructions as to this point must be given to all these provisions. There can be no distinction made. In my judgment therefore, the decision in *Davis v. Weibbold*, covers, and concludes, this case. This case also affirms the ruling in *Cowell v. Lammers*, 10 Sawy. (U. S.), 246, 21 Fed. Rep. 200 and in *Deffenback v. Hawke*, 115 U. S. 392, 406, that the insertion in a patent of an exception, not expressly authorized by law, is void.

A question has also been suggested in this case, as to when there must be a "*known mine*" in order to take it out of a grant to the railroad company under the exception in the grant? The four points of time suggested, are, the date of the act of congress making the grant; the time of the filing of a map of the general route; the time of the definite location and filing a plat thereof in the office of the commissioner of the general land office, and the date of the issue of a patent. The ruling of the circuit court for the district of California, heretofore has been, that the date of the definite location of the line of the road, is the date at which the mineral character of the land must be known, in order to take it out of the grant. Thus upon the trial of *Francoeur v. Newhouse*, the court so

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charged the jury. The following is the language of the charge: "The words 'mineral lands,' as used in the act of congress, mean lands known to be mineral at the time the grant took effect, and attached to the specific land in question, or which there was satisfactory reason to believe were such at said time. Only such land as was known to be mineral, or which there was satisfactory reason to believe was mineral at the time the grant attached to the land, is excepted from the grant. \* \* \* The question then arises, whether or not they were known, or there was sufficient reason to believe, at the time this grant attached—and that is when the line of the road became definitely fixed, according to my construction of the act—to be mineral land." 14 Sawy. (U. S.), 603, 604, 43 Fed. Rep. 238.

Until that time the grant is a *float*, and does not attach to any particular land. No one, till then, can know upon what land the grant will, ultimately, fall. Up to the definite fixing of the line of the road, it is all public land, and there is nothing to prevent any interest recognized by this law, not otherwise prohibited, from being acquired. The railroad company up to that time has acquired no interest in any specific odd section of land; but at the moment the line is definitely fixed, and a plat filed in the office designated by law, the grant attaches itself to all odd sections not embraced in any of the exceptions; and the title of the company becomes indefeasible except by a failure to perform the conditions subsequent, and the taking of proper means to forfeit the grant by the government. Upon the performance of the conditions, the title in the company, before, in a certain sense inchoate, becomes perfected and indefeasible. If none of the exceptions are operative to prevent the title from vesting when the line is so definitely fixed, of course, the title takes effect, by relation from the date of the act, without affecting any other vested interest whatever. But if the land is within one, or more, of the exceptions, at the time the grant would, otherwise, attach, it is taken out of the grant altogether, and nothing passes, either present, or by relation to the date of the granting act. Thus, if an odd section is *known mineral land*, at the date when the grant would otherwise attach, it is not within the grant, and no vested interest is affected, either present, or by relation. So, under section 6, which protects the lands for the company within 40 miles of the *general line* after it shall be fixed, from sale, entry or pre-emption by other parties, till the company can, definitely, fix its line, does not prevent the discovery of a mine, or prevent a mine from becoming *known* at any time before the line is definitely fixed, as prescribed by law; and should

there be a *known* mine, when the company's grant attaches to the specific lands by definitely fixing its line, I apprehend, that it would not pass by the grant, whether anybody else, by "purchase, entry or pre-emption," could acquire an interest in the *known* mine or not. There is no provision in the act against the discovery of a mine, or against a mine becoming known during the withdrawal from sale, in such sense as not to bring it within the exceptions of the grant to the railroad company, and thus take it out of the operation of the grant. And when a discovery of a mine is once made, *before the grant attaches*, the land is at once brought within the exception, and taken out of the scope of the grant, and is no longer within the prohibitory clause of section 6, and it is not perceived why a mining claim may not be at once located. It can no longer be regarded as one of "the odd sections of land hereby granted," within the meaning of the provision of section 6 that "the odd sections *hereby granted* shall not be liable to sale, or entry, or pre-emption," except to the company. The following passage from the decision of Davis v. Weibbold, referring to a former decision would seem to reach and cover this point. Says the court: "We stated there that land embraced within a town site on the public domain, when unoccupied, was not exempt from location and sale for mining purposes, and referred to the fact that some of the most valuable mines in the country were within the limits of incorporated cities, which had grown up on what was on its first settlement a part of the public domain. We were speaking at that time of town sites *for which no patent had been issued*, and of mines in public lands, for immediately after using these expressions, we said: '*Whenever, therefore, mines are found in lands belonging to the United States*, whether within or without town sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with.'" If this view be correct, and I think it is, then the ground of the *objection suggested* that the limitations of the exception of the grant to *mines known* at the date when the grant attaches by a definite fixing of the line of the road, would take from the holders all mines discovered between the date of the act of July 2, 1864, and the definite location of the road, 18 years thereafter, on July 6, 1882, *fails*; for such mines, so discovered, and *known before July 6, 1882, would be excluded from the grant*, by the exception.

It has been urged, also, that, in some instances, the line of the road, as finally definitely located, and fixed, and upon which it is now constructed, is not within 100 miles from the *general* line at first fixed, and under the provisions of section 6, the lands within 40 miles of which were for the time being

withdrawn from "sale, or entry or pre-emption" except by the railroad company; and that the construction insisted upon by defendants, would be disastrous to all parties, discovering, and locating, mines within that 40-mile belt from the date of the act till the final definite location of the line in 1882. But this objection is answered by what is said in the last paragraph, that there is no provision in the act against mines becoming *known*, at any time, before the grant attaches by the definite location. If the mines are *then known*, they fall within the exception. Besides, the moment the line of the road becomes definitely fixed, in the mode prescribed by the act, no matter when it is, the lands within 40 miles of the *general* line, not within the prescribed distance from the line as finally definitely fixed, are, necessarily, discharged from the disabilities imposed in section 6, for they, thereafter, never can become "the odd sections of land *hereby granted*," within the meaning of that section. The decision in *Davis v. Weibbold*, also, affirms the ruling in *Francoeur v. Newhouse*, 14 Sawy. (U. S.) 358, 359, 40 Fed. Rep. 618, 40 Am. & Eng. R. Cas. 439, that a patent issued to land in which the title has already passed out of the United States, is utterly void, and may be shown to be void even in an action at law to recover the land. If it is necessary that the land should be known to contain valuable mines in order to bring it within the exception of the grant, then in opposition to the rule hereinbefore expressed, it is insisted that the point of time when the land should be known to be mineral, in order to exclude it, is, not when the line of the road is definitely fixed, but the time when the patent issues—that the title to the land does not vest until the issue of the patent, and the character of the land, as it is then known, or supposed to be, is to control. The passage from the decision of the circuit court in *Cowell v. Lammers*, 10 Sawy. (U. S.) 257, 21 Fed. Rep. 200, that "there must be some point of time, when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine the question, than at the time of issuing the patent," is quoted, to sustain this view. This observation, perhaps a little too general, was made with special reference to the facts of that case, wherein, the railroad company had not only fixed its line, and completed its road, but a patent had issued to it in conformity with the statute, covering the mine, years before the mine was discovered, and located. The title therefore had not only vested under the legislative grant, but the question as to the right of the company to the land as being non-mineral, had been determined in its favor, and the grant was *confirmed* by the patent, while the locator of the mine had

nothing as evidence of title. He had simply by a trespass upon lands, thus determined to be private property, discovered, and located a mine. He was, therefore, in no position to, collaterally, assail the title of the plaintiff, as is well settled by numerous decisions of the supreme court. It was with reference to this condition of things, that the observation was made, proper enough, as applicable to the facts of that case, but certainly not intended to impugn the decision of the supreme court, as to the time, when the title to the lands, under the statute, *actually first* vested in the railroad company. That the title vests upon the definite location of the road, subject only to be defeated by failure to perform the conditions subsequent and proper measures thereupon taken to forfeit the grant, had been so often decided by the supreme court, that it did not seem open to further argument. Yet, the question was again raised under the identical act now in question, in the case of St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, (recently decided), and that construction was emphatically reaffirmed. If possible, the point of the ruling is stated in more perspicuous and unmistakable language than in any former case; and I shall, therefore, quote liberally from the decision, as it appears to place beyond all possible grounds of doubt, the time when the lands must be *known* to be valuable for its minerals, in order to bring them within the exceptions of the legislative grant. Says the court: "As seen by the terms of the third section of the act, the grant is one *in præsenti*, that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption, or other disposition previous to the time the definite route of the road is fixed. The language of the statute is '*that there be and hereby is granted*' to the company every alternate section of the lands designated, *which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one in præsenti; that is to say, it is of that character, as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.*" 139 U. S. 5. Thus, it is said, the language—"implies that the *property itself* is passed, *not any specific or limited interest in it. The words also import a transfer of a*

*present title, not a promise to transfer one in future. \* \* \** The title does not *attach* to any specific sections until they were capable of identification, but when once identified, *the title attached to them*, as of the date of the grant, *except as to such sections as were specially reserved*. It is a grant '*in presenti*,' as to all lands within the terms of the grant, and *not reserved from it at the time of the definite location of the grant.*"

Is it possible to express, more clearly, the idea maintained in this opinion, as to when the grant *attached and title passed*, and, consequently, *when the lands must be known* to be mineral, in order to bring them within the exceptions of the grant? And lands *known* to be mineral, as the provision is construed by the supreme court, and, then only, are the lands excluded on the ground that they are mineral. Again, says the court: "It is contended that they are qualified and restricted by the provision of the fourth section, that whenever 25 miles of the road are completed in a good, substantial and workman-like manner, and the commissioners appointed to examine the same have made a report to that effect to the president, patents shall be issued 'confirming to said company the right and title to said lands situate opposite to and coterminous with said completed section of said road.' *This provision, it is urged, is inconsistent with the theory that a title to the lands had previously vested in the company. We do not think so.*" 139 U. S. 6.

Thus, the court recognizes the fact, that the provisions of the act as to issuing patents, describes the patent as only "*confirming*" the title *already vested, not as, originally granting, or passing the title*. And again: "The construction we give to the granting terms of the act, as qualified by subsequent provisions, not only secures the application of the property to the construction of the road and telegraph line, and thus carries out the purposes of the government, *but also secures the company against any attempted alienation of the land to other parties.*" 139 U. S. 7.

Thus, the legislative grant *in presenti*, in the act, "*secures the company against any attempted alienation of the land to other parties.*" So, in *Davis v. Weibbold*, already cited, reaffirming prior decisions, the court says: "We agree to all that is urged by counsel as to the conclusiveness of the patents of the land department when assailed collaterally in actions at law. We have had occasion to assert their unassailability in such cases in the strongest terms, both in *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636, 640-646, and in *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447, 451, 452. They are conclusive in such actions of

all matters of fact necessary to their issue, where the department had jurisdiction to act upon such matters and to determine them; *but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or other disposition, or they had been reserved from sale, the department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed.* In the several cases to which we have been referred in the fifth and sixth Montana Reports, (*Silver Bow Min. & Milling Co. v. Clark*, 5 Mont. 378; *Talbott v. King*, 6 Mont. 76; *Butte City Smoke-House Lode Cases*, 6 Mont. 397,) which involved contests between parties claiming under mining patents and others claiming under town-site patents, and in which very able and learned opinions were given by the supreme court of the territory of Montana, the mining claim patented had been located and the rights of the mining claimant had thus attached before the town-site patent was issued. The patent, which, subsequently, followed was a mere perfection of the right originated by the location, and to which it took effect by relation. It was held in accordance with this opinion, that the prior mining location was not affected by the town-site entry." 139 U. S. 529.

So, that, in this class of cases, the ascertainment, and final determination as to the mineral character of the land, as against the company, cannot, as contended, be left to the commissioner on the issue of the patent. And if the determination be so made, his decision against the company would not be conclusive, as to whether the title to the land had or had not already passed out of the United States under the congressional grant. A patent wrongfully issued to others, however, could be collaterally attacked, by the company on its patent, even in an action at law, and the company without a patent could stand upon its legislative grant attaching upon the definite location and completion of the road as required by the act, even against subsequent patents, wrongfully issued to other parties. Indeed the commissioner is not in a position, in this class of cases, to summon witnesses and, intelligently, investigate, and finally decide the facts as to the mineral character of all the odd sections of lands, either at the date of the attaching of the grant, or of the issue of the patent; and if he were invested with such final jurisdiction, the point of time to which the investigation should be directed, would be, the date when the line of the road became definitely fixed, and a plat thereof filed in the office of the commissioner of the land office—the date at which the grant became attached to

the specific sections of land, and not the date of the issue of the mere *confirmatory* patent. Again on his views of the law, the commissioner often refuses to issue patents to the railroad company in cases where it is entitled to them. In such cases the company would have no remedy, as to those lands, unless the foregoing views are correct. There could then be no patent to settle the question.

Under these various decisions of the supreme court, and others cited by that tribunal, with approbation, I am satisfied that to exclude the lands from the operation of the grant, they *must be known to be mineral at the date when the line of the road becomes definitely fixed, and a plat thereof filed in the general land-office*,—in this case on July 6, 1882, and that the demurrer to the complaint must be overruled. My associate dissents in a very able opinion, in which he very forcibly, and lucidly, presents, as it seems to me, all that can be said in opposition to the views herein expressed. My own conclusions, however, I have reached after repeated and thorough examination, and I cannot see the case in any other light. The points of difference between us, therefore, must be left to the supreme court, to authoritatively determine.

This I believe, is a representative case—several others depending upon its decision. I suppose the facts in the complaint are alleged as they must turn out in the proofs. If that be so, then a default might be safely suffered, and a judgment entered before the 1st of July, and an appeal taken to the United States supreme court. Otherwise, the appeal will go to the circuit court of appeals. It is desirable that a question affecting interests so vast should be determined by the highest court in the land. Under the provisions of section 650, Rev. St., when there is a difference of opinion between the circuit and district judges, sitting together, the opinion of the presiding judge prevails for the time being.

In pursuance of the provisions, let the demurrer to the complaint be overruled, and the defendants have ten days within which to file their answer.

KNOWLES, J., (*dissenting*).—This is an action at law. The complaint sets forth sufficient facts to show that plaintiff received a grant from the United States of all odd alternate sections of lands within forty miles of the line of its railroad as definitely located in Montana, not mineral, and which at the time its line of railroad was definitely fixed, were not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights. It is further set forth that the land described in the complaint was a portion of one of the said odd sections within forty miles of the line



of the road of plaintiff as definitely located; that defendants have taken possession of the same, and now withhold the possession thereof from plaintiff. It is not stated directly that the said land is non-mineral, but that it was not known to be such at the date of said grant on July 2, 1864, nor, at the time the general route of said railroad was located in 1872. It is alleged, however, that it was more valuable at said dates for grazing, than mining purposes and that when the land was surveyed in 1868, it was returned by the surveyor as non-mineral. In 1886, it is alleged that plaintiff listed in the United States land office at Helena, with other lands, the premises in controversy, and paid for filing such list the fees allowed by law, and the receiver duly accepted the same and approved of said list, and certified the same to the commissioner of the general land office, and that that list remains in both land offices, and no part of the fees so paid have been returned to plaintiff. It is also alleged that at the time of filing said list said land was not known to be mineral, or had any value for mining purposes, but that during the year 1888, certain veins or lodes of rock in place bearing gold, silver and other precious metals were discovered thereon, and thereafter to wit on the 20th day of June, 1888, a portion of defendants and under whom the others claim located said lodes as mineral land under the name of the "Vanderbilt," "Four Jacks," "N. Y. Central" and "Hudson River" respectively, and on the 9th day of May, of said year, another lode under the name of the "Chauncey Depew" lode, and that they are now in possession of said locations and are extracting ore therefrom, and have taken therefrom ore of over the value of \$100, and that the value of all the property is over \$6,000. The defendants have demurred to this complaint, on the ground that the same does not state facts, sufficient to constitute a cause of action.

There is undoubtedly, much in this complaint that might be called redundant or irrelevant matter. But concerning this the court is not called to rule. If a complaint states facts which show that plaintiff is not entitled to recover, then the ground of demurrer, that it does not state facts sufficient to constitute a cause of action, will lie. In this case plaintiff undertook to set up certain facts which would show that the land in controversy was within the grant to it, and not within the exception of that grant as being mineral, as that grant, it claims, should be interpreted. In order to recover for rents, issues and profits, the location of lodes on the premises and the extracting of ore therefrom is averred. It appears also that no patent had

ever issued to plaintiff for the premises. While the complaint is not as satisfactory as it might be, upon the point as to whether the premises are now known to be mineral land or not, still, I think enough appears to show that they are of that character. It appears that they are over the value of \$6,000, and that over \$100 worth of ore has been taken from them, and that the lodes located contain gold and silver. I do not conceive that in determining whether or not land is mineral land the question is whether or not it is more valuable for the mineral therein, than it is for grazing or agriculture. The statute of the United States, upon mineral lands is "in all cases land valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." Rev. St. U. S. § 2318. So I would say, that lands which have a market value for the minerals therein, without any reference to any other character or quality connected therewith are mineral lands. I do not think it is necessary to show that the lands contain paying mines. Such has not been the accepted definition of mineral lands in the land department of the United States, or by those engaged in mining avocations in this country. Land is being claimed almost every day as mineral, which contain no such mines, and the United States land department is almost daily issuing patents for such lands as mineral. The term "mineral lands" must be considered as having been used by congress in the sense in which that term was used by practical men in mining engaged in that industry at the date of the grant. Lands are often sold for large sums of money on account of the minerals therein which have never been worked to a profit for such. With this definition of mineral lands, I think it safe to say that the premises in controversy must be classed as mineral.

The question then arises, whether, not having been known to be mineral at the date of the grant of land to plaintiff on July 2, 1864, nor at the date when the general route of its road was located in 1872, nor at the time it was listed by plaintiff for patent as within its grant, in 1886, but now known to be mineral, it must be classed as within plaintiff's grant. The grant of land to the Northern Pacific Railroad Company, is contained in the third section of the statute of the United States organizing that company, and the part necessary to be considered in this case is as follows: "That there be and is hereby granted to the Northern Pacific Railroad Company, its successors and assigns for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe transportation of the mails, troops, munitions of war and public stores, over the route of said railway,

every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad where it passes through any state, and whenever on the line thereof the United States have full title not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office: \* \* \* Provided, further, that all mineral lands be, and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road may be selected as above provided."

The contention of plaintiff is that the above grant is one *in praesenti* conveying the fee to it at the date thereof, and that it should embrace all lands within the limits of its grant not known to be mineral, or which there was no reasonable ground for believing to be mineral at such date. In other words, in the exception, and in the proviso in the grant in regard to mineral lands it should read, not known to be mineral or which there was no reasonable ground for believing to be mineral. This brings up for consideration the question; as to how this grant should be construed. It is a public or legislative grant made by a statute of congress. "In all questions of construction arising under grants between the government and the citizen, a different rule prevails in one respect from that adopted in questions between individuals. Between the latter, the construction if doubtful, is always to be in favor of the grantee and against the grantor, whereas in the case of the government, the construction is always against the grantee and in favor of the government." 3 Washb. Real Prop. (4th Ed.) p. 190.

One of the leading cases upon the subject of legislative grants is that of *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.), 420. It is a case very often referred to, and is the foundation of much of the federal jurisprudence upon this point. The decision was delivered by the distinguished Chief Justice TANEY, and in it the court said: "The rule of construction in such cases is well settled both in England, and by the decisions of our own tribunals." In 2 Barn. & Adol. 793, in the case of *Stourbridge v. Wheely*, the court says: "The canal having been made under an act of parliament, the rights of the plaintiff are derived entirely from that act. This, like many other cases, is a bargain between a company

of adventurers and the public, the terms of which are expressed in the statute, and the rule of construction in all such cases is now fully established to be this, that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiff can claim nothing that is not clearly given by the act."

This rule of construction is fully adopted by the supreme court in the above case. This question came again before the supreme court in the case of *Dubuque & P. R. Co. v. Litchfield*, 23 How. (U. S.) 66, and it holds this language, in referring to a legislative grant similar to the one of plaintiff's under consideration: "All grants of this description are strictly construed *against* the grantees; nothing passes but what is conveyed in clear and explicit language, and as the rights here claimed are derived entirely from the act of congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed they cannot be implied." And in this case the court quotes with approval, the reason for this rule of construction from *Gildart v. Gladstone*, 11 East, 675: "The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language explicit and clear to pass everything that is intended to be passed, it is their own fault, while on the other hand such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms."

In the case of *Rice v. Minnesota & N. R. Co.*, 1 Black, (U. S.) 360, the supreme court say: "It is the settled rule of construction that public grants are to be construed strictly and that nothing passes by implication." It has been urged, however, that the legislative or public grant in the case at bar was for a valuable consideration and should therefore be subject to the same rule of construction as grants between private parties, and hence liberally in favor of the grantee, and in such a manner as to give it a full and liberal operation, so as to carry out the legislative intent. It is not necessary now to discuss this rule of interpretation and show its limitations.

Every one of the above legislative grants referred to were made upon the same consideration as the grant to plaintiff, namely the construction of an internal improvement of some value to the public. The supreme court, however, has held that all these grants are subject to be strictly construed, and in the case of *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733, it was held that all these railroad grants should receive

a strict construction against the grantee. In that case the court held this language: "The difference would seem to imply obscurity in the act; but be this as it may, the rules which govern the interpretation of legislative grants are so well settled by this court, that they hardly need be reasserted. They apply as well to grants of land to states to aid in building railroads as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote, but declines to undertake."

Here is a distinct assertion that these rules of interpretation apply to all such railroad grants as plaintiff's. And in this case, again, in regard to the rules of construction of the grant then under consideration says: "It should be neither enlarged by ingenious reasoning, nor diminished by strained construction, the interpretation must be reasonable, and such as will give effect to the intent of congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If the terms are plain and unambiguous, there can be no difficulty in interpreting them, but if they admit of different meanings, one of extension, and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of congress to confer them. In other words what is not given expressly, or by necessary implication, is withheld."

Upon this point of the construction of legislative grants I have quoted liberally from the masters in the domain of our jurisprudence, and their language gives no uncertain sound. Legislative grants must be construed most strongly against the grantee, and must not be enlarged by implication. In looking at the terms in the grant we find mineral lands are excepted therefrom. This was in accordance with the settled policy of the government. In the case of *Ivanhoe Min. Co. v. Keystone Consolidated Min. Co.*, 102 U. S. 167, the supreme court held that it was the public policy of the United States not to dispose of its mineral lands as agricultural, or in any other way than as mineral lands to be devoted to the pursuit of mining, and as provided in a special statute upon that subject. And in that case the court on account of this well-known policy inserted into a grant of the sixteenth and thirty-second sections of land to the state of California for common schools, an exception of mineral lands, although, no such terms appear in the grant. This was based upon the ground, that considering this settled policy of congress, it could not have in-

tended to grant to California, for school purposes, mineral lands. The Northern Pacific Railroad Company grant was one *in praesenti* as I have said conveying the legal title. This view although I conceive to be in conflict with other decisions of the supreme court, upon this point, is supported it appears, to me, by the latter decisions of that distinguished tribunal. *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 29 Am. & Eng. R. Cas. 455; *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496, 41 Am. & Eng. R. Cas. 669; *Denny v. Dodson*, 13 Sawy. (U. S.) 68, 32 Fed. Rep. 899. The title of plaintiff took effect on July 2, 1864. By inserting the words into its grant, known mineral lands or lands which there were reasonable grounds for supposing were mineral, and it is apparent, then, that in Montana, and northern Idaho, along the route of plaintiff's road, its grant would be materially enlarged. On July 2, 1864, comparatively little was known of the great mineral resources of this section. There were but two mining camps of any importance in Montana at that time, and one of these was south of the 40-mile limit of that road. The great quartz mining interests of Montana, were then almost, if not entirely, unprospected. In northern Idaho no mineral developments had been made worthy of mention, nothing was known of its great mineral resources. It may be said that the only mines then sought for were placers. But few miners in this section knew anything of silver or copper mining, and none had any knowledge of the extent of these mines along the route of plaintiff's road. Silver mining had not existed in the United States for more than five years previous to 1864, and gold quartz mining in the western states and territories, not more than ten years. Copper mining was only known on the shores of Lake Superior in Michigan. None of this country had been surveyed. Plaintiff did not know just what route would be selected for its road. It had not been surveyed even in a preliminary way. Large portions of the country had never been explored, except by wandering bands of trappers. Gold mining confined to placers, had existed in Montana, for only two years. Under these circumstances it is reasonable to suppose that congress knew that there was but little known of the mineral resources of this section. That if it intended to exclude only known mineral lands, or those concerning which there were reasonable grounds for considering were mineral, it was not excepting any extent of mineral lands, and it might as well have left out that exception in the grant. Considering the settled policy of the government in regard to its mineral lands, and the rules of construction of legislative grants and the limited knowledge which prevailed in regard to the mineral resources along the route of plaintiff's road at

the date of the grant, and I do not think it proper to extend that grant by inserting the words desired in the exception of mineral lands therein. I see no reason for enlarging that grant by adding words or terms not placed there by congress. In the case of *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733-751, the supreme court quoted with approval these words from *Rex v. Burrell*, 12 Adol. & E. 460: "I see the necessity of not importing into statutes words which are not found there, such a mode of interpretation only gives occasion to endless difficulty." And the supreme court adds: "Courts have always treated the subject in the same way when asked to supply words in order to give a statute a particular meaning which it would not bear without them." In the case of *Newhall v. Sanger*, 92 U. S. 761-765, the court said, in interpreting a statute: "It is said this means, lawfully claimed, but there is no authority to import a word into a statute in order to change its meaning." We are met in the argument in this case with the assertion that it was not sought by plaintiff to insert any words into the grant. That the word "known" was a part of the definition of mineral lands; that lands were not mineral lands until they were known to be such. In other words the Comstock lode of Nevada; the rich placers of Alder gulch and Confederate gulch; and the valuable lodes at Butte City in Montana, were not mineral lands until they were discovered to be such. Up to this time they were agricultural land. It appears to me that this is a novel and original term to be imported into the definition of mineral land, and I cannot consent to its use. I think hereafter I may show how this word "known" came to be used in connection with mineral lands, and that it had nothing to do with the definition of the same. I do not see how congress could have declared more emphatically than it did in this act, that it did not intend to grant to plaintiff mineral lands. In the granting clause in the section making the grant, it excepted mineral lands; then in a proviso attached to the same said "That all mineral lands be, and the same are hereby excluded from the operation of this act."

The only question of difficulty is, to determine, what are mineral lands, and when this is reached they did not pass to plaintiff in its grant. I cannot consent to any construction of that grant which will modify and enlarge its terms. It is true that the learned court, in the case of *Francoeur v. Newhouse*, 40 Fed. Rep. 618, made a construction of the legislative grant of land to the Central Pacific Railroad Company which is adverse to this view. The grant of land to that company was made in terms almost identical to that made to plaintiff. The construction of that grant in that case in effect

placed the word "known" before mineral in that grant, or the terms "which there was reasonable ground to suppose or believe were mineral." The distinguished judge who rendered that opinion gave the weight of his great reputation, to that construction. He has given many years of labor to interpreting congressional and other grants, and to the construction of the mineral statutes of the United States. For years, upon the subject of the law in regard to mineral lands, I have been accustomed to follow him. He is the presiding judge of this circuit; hence it is with much hesitancy and some trepidation that I assume to differ with him in this matter. He held that he was forced to his conclusions on account of the rulings of the supreme court in the cases of *Defeback v. Hawke*, 115 U. S. 399, and *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 309. In neither of these cases was the supreme court considering statutes like the grant to the plaintiff. In the first the court was called upon to construe the statute in relation to the entry and purchase of town-sites. In this case the policy of the government was reviewed in regard to mineral lands. In this connection the court considered the pre-emption and homestead laws as well as the town-site act. They were classed together, and it was held that only the same character of lands could be purchased under any of these acts. It was found that under the pre-emption and homestead acts, lands containing known salines and mines, could not be purchased. In the town-site act it was provided that by virtue of its provisions no title should be acquired "to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws." The court was then confronted by the mineral act of congress, the first section of which provides: "In all cases lands valuable for minerals shall be reserved from sale except as otherwise expressly provided." These statutes were all *in pari materia*, and hence the court was authorized to construe them together. They are general statutes relating to one subject, the sale and disposal of the public lands. They had to be harmonized. And the court held that under the above acts, in regard to pre-emptions, homesteads, and town-sites, land could be purchased which was not known to be mineral. In this case, nowhere, was there anything that would bear upon grants of land to private corporations in aid of the construction of railroads. Here for the first time, we find the phrase "lands known at the time of the sale to be valuable for minerals." The court said: "It is plain from this brief statement of the legislation of congress, that no title from the United States, to land known at the time of the sale to be valuable for its minerals of gold, silver, cinnabar or copper,



can be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands except, in the states of Michigan, Wisconsin, Minnesota, Missouri, and Kansas."

I think hereafter I may be able to show why the court used the above language: "lands known at the time of its sale to be valuable for its minerals," etc. In the case of Colorado Coal & Iron Co. v. U. S., *supra*, the court was called upon to construe the pre-emption act, and the mineral act. It classed coal lands as mineral lands and following Deffeback v. Hawke, *supra*, said, that lands known at the time of sale to contain mines, or which were at that time known to be valuable for the minerals therein contained, could not be obtained under the pre-emption act. In this, there was no construction of any such grant as plaintiff's.

In the argument in this case, the recent decision in the supreme court of Davis v. Weibbold, was cited. This was an action on the part of a mineral claimant who had obtained a patent to a parcel of land within the exterior limits of the Butte town-site, which patent was subsequent to that of the patent for the town-site. The defendant, Davis, offered to prove that at the time of the issuing of the patent which would relate of course, to the time when the sale of the Butte town-site was consummated, that the premises embraced within the Weibbold patent, were not known to be valuable for minerals. This evidence was introduced for the purpose of showing that the land was subject to purchase as a town-site at that time. This was excluded, and the defendant, Davis, appealed to the supreme court of the United States, assigning this ruling among others, as error. Now in this case all that the court was called upon to consider was the mineral act and town-site act, and statutes *in pari materia*. There are some declarations in that opinion which taken by themselves, might lead to the inference, that the court had expressed its opinion upon the point at issue. For instance it says: "It would seem from this uniform construction of that department of the government specially intrusted with the supervision of proceedings required for the alienation of the public lands including those that embrace minerals, and also of the courts of the mining states, federal, and state, whose attention has been called to the subject, that the exception of mineral lands from grants, in the acts of congress, should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction. *The grant or patent when issued would thus be held to carry with it*

*the determination of the proper authorities that the land patented was not subject to the exception stated."*

In connection with a railroad grant like plaintiff's, which was made by an act of congress, it would be difficult to speak of it as having issued to plaintiff. "Issued," when we speak of a deed or patent usually means "delivered." In considering a legislative grant the term does not apply. What are the proper authorities to determine that any lands were not subject to an exception stated in a grant, if we confine ourselves to the date of the grant? Congress when acting officially usually expresses its determination in laws. It is a legislative, not a judicial body. If congress has not determined this matter by the terms of its enactments, I cannot see how it has determined it at all. The grant to plaintiff was in the nature of a float, and attached to no specific land until the date the line of its road was definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office. It was some 18 years after the date of the grant before this definite route was fixed in Montana. Can it be, that congress, 18 years before the grant took precision in any way, determined what land was not subject to the exception stated in the grant? I think this cannot be maintained. I cannot help thinking, that the term "grant" used in the above quotation, was used as synonymous with the term "patent," or of land specifically described. The land department is a special tribunal intrusted with the power, I think, of determining such matters, and does determine them when awarding a patent. If, however, it should be considered that the term "grant" as used in that clause referred to legislative grants like plaintiff's, then that question in that case was not before the court for consideration, and the rule of the supreme court as expressed in *Cohens v. Virginia*, 6 Wheat. (U. S.), 264, applies: "That general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." There was no argument or facts, in the case of *Davis v. Weibbold*, upon which to base any ruling upon the construction of the terms of plaintiff's grant. It is said, however, that the statute making plaintiff's grant, and the town-site act are *in pari materia*, and the construction of one applies to the other. In the first place, the terms in the town-site act the court was called upon to construe, are very different from those in plaintiff's grant. In the next place, the statutes are not *in pari materia*. They do not relate to the same subject. The town-site act is a general law providing

for the disposal of public lands in certain cases. It is part of a system of laws upon the subject of the disposal of such lands. The grant to plaintiff, is one to a private corporation, to aid it in constructing a railroad. If it is *in pari materia* with the general laws upon the subject of the disposal of public lands, then every grant to a private or public corporation in aid of railroad construction is *in pari materia* with such general laws, and it follows must be *in pari materia* with each other. In the case of *United Soc. v. Eagle Bank*, 7 Conn. 457, the supreme court of that state said: "But private acts of the legislature, conferring distinct rights on different individuals which never can be considered as being one statute or the parts of a general system are not to be interpreted by a mutual reference to each other. As well might a contract between two persons be construed by the terms of another contract between different persons." And in speaking of the phrase "*pari materia*," the court said: "It is a phrase applicable to public statutes or general laws made at different times, and in reference to the same subject." The act making the grant to the plaintiff is not a public statute or general law. It does not therefore appear to me that the case of *Francoeur v. Newhouse*, *supra*, can be considered as supported by the cases cited in the opinion rendered in that case, or when properly considered by the case of *Davis v. Weibbold*, *supra*.

I come now to the consideration of how the phrase "known mineral lands," came to be used. In the case of *Johnson v. Towsley*, 13 Wall. (U. S.) 72, the doctrine was recognized, that the land department was a special tribunal, having authority to hear and determine questions which might arise in the sale and patenting of public lands. In the case of *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447, in speaking of the land department, the supreme court said: "That department as we have repeatedly said was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily therefore, it must consider and pass upon the qualifications of the applicant, the acts he has to perform to secure the title, *the nature of the land* and whether it is of the class open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation."

In the case of *French v. Fyan*, 93 U. S. 169, the land department having determined that a certain tract of land was swamp land, the supreme court treated this as the determina-

tion of a special tribunal which was binding in all actions not brought to annul the patent. In that case the court said: "The patent therefore which is the evidence that the lands contained in it have been identified as swamp land under the act relates back and gives certainty to the title of the date of the grant." This and the preceding decision referred to, certainly maintain the doctrine that the land department is clothed with authority to determine whether land is mineral or swamp, or not. Following these decisions are the cases of *Pacific Coast Min. & Milling Co. v. Spargo*, 8 Sawy. (U. S.) 645, 16 Fed. Rep. 348, and *Cowell v. Lammers*, 10 Sawy. (U. S.) 246, 21 Fed. Rep. 200. The opinions in both of these cases were delivered by the distinguished judge who delivered the opinion in the case of *Francoeur v. Newhouse*, *supra*. In the first, he said: "The land officers were charged with the duty of ascertaining whether the lands were subject to be patented or not, and that determination is conclusive at least in this action." In the latter case he said: "There must be some point of time when the character of land must be finally determined, and for the interest of all concerned there can be no better point to determine this question *than at the time of issuing the patent*." The learned judge then proceeds to show how disastrous to his section of the country any other ruling would be. The case of *Davis v. Weibbold*, *supra*, fully sustains the view that the land department is intrusted with the determination of the question, as to whether land is mineral or not. And shows that this is in accordance with the view in several cases in both state and federal courts, and in accordance with the view the land department has of its own powers and its practices. But while the land department is intrusted with these powers, still, if in determining these facts, as to whether land is mineral or not, it is imposed upon by fraud, or there has occurred a mistake, their determination may be set aside and the patent they have issued annulled. If the land was known to be mineral at the time of issuing of the patent by the grantee, it has been treated as fraud sufficient to annul the patent thereto. *U. S. v. Rose*, 11 Sawy. (U. S.) 83, 24 Fed. Rep. 196; *U. S. v. Iron Silver Min. Co.*, 24 Fed. Rep. 568, 128 U. S. 673; *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307. In the case of *Mullan v. U. S.*, 118 U. S. 271, the supreme court set aside a patent for former coal lands where there was no fraud practiced, but because there was a mistake in regard to the law as to coal lands being included in the term "mineral lands." In the case of *McLaughlin v. U. S.*, 107 U. S. 526, the supreme court set aside a patent because it was known at the time the patent was is-

sued, that the land embraced in the patent was mineral land, and hence the patent was issued through inadvertence and mistake and without authority of law. I have found no cases where the land department has passed upon the question of the character of land patented, that the patent has been sought to be set aside, except for some fraud practiced upon the land department, or there was some mistake, such as would entitle the United States to relief in a court of equity. If the land was not known to be mineral, no fraud was practised in that department, and the title to such land was unassailable. Sedg. St. & Const. Law, 390. These were the reasons that induced the supreme court in *Defleback v. Hawke*, *supra*, to declare if the land was not known to be mineral at the date of the sale or issuing a patent, there was no cloud upon a patent title for such land purchased as agricultural. And this is the reason why the term "known mineral lands" was used. The same rules which apply to agricultural lands obtained under the homestead, pre-emption or town-site acts would undoubtedly apply in issuing patents to railroad lands. The case of *Cowell v. Lammers*, *supra*, was a patent for earned railroad lands. In the case of *Denny v. Dodson*, 13 Sawy. (U. S.) 68, 32 Fed. Rep. 899, the court said that a patent would identify the lands which are coterminous with the road completed, and in the case of *Wisconsin Cent. R. Co. v. Price Co.*, *supra*, the supreme court said of patents to lands granted *in praesenti* to railroads: "They would serve to identify the lands as coterminous with the road completed." The land department is charged with the duty of issuing patents for earned railroad lands to plaintiff, and in so doing it must determine the character of the lands to which a patent is to issue, and as to whether they are such as are within the terms of the grant, and hence must determine as to whether they are mineral or not. Until a patent is issued these lands are not fully identified, and in any action concerning them the railroad company must resort to other evidence to identify them, and show that they are the lands granted. When a patent issues this will show that the land described in the same, are lands granted to the company, and no other identification will be needed. And this patent only can be impeached by an action in equity brought by the government to set the same aside for fraud or on some other ground cognizable in a court of equity, and will prevail in any action against any one claiming by a junior title. *Meader v. Norton*, 11 Wall. (U. S.) 442.

I do not think congress intended to leave it always an open question to be settled by the verdict of a jury as to whether

or not any specific portion of an odd section within the limits of plaintiff's grant were granted to it or not. But if the question for consideration is whether or not, a given piece of land was known to be mineral at the date of plaintiff's grant, how is it to be otherwise determined? It cannot be supposed that the land department before it issues to plaintiff a patent for any tract of land is to enter upon the investigation as to whether it was known to be mineral or not on the 2d day of July, 1864. What means has the land department for entering upon such an investigation? If the grant attaches to all lands not known to be mineral at the date of the grant the determination of the land department that any land was not known to be mineral at any date subsequent to the date of the grant, ought to have no effect upon the grant or any binding force upon anybody. There was something said in the argument presented in this case that the grant of plaintiff would attach to all lands not known to be mineral at the time the line of plaintiff's railroad was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, and the grant of plaintiff received precision. This is not a doctrine I supposed, was contended for in any other case but the one at bar. It was not generally supposed that the case of *Francoeur v. Newhouse*, *supra*, maintained such a doctrine. The general scope of the opinion of the court in ruling upon the demurrer in that case leaves a very different impression. In that case, (14 Sawy. (U. S.) 355, 40 Fed. Rep. 620, 621,) the learned judge said: "The parties to this grant, both the United States, and the grantee, must be presumed to have contemplated a grant in view of the condition of the lands as they were known or appeared to be at the time the grant took effect. \* \* \* The conditions constituting the exception ought certainly to be as ascertainable at the time the grant takes effect, or they ought not to be operative."

Considering this language in connection with that used in the case of *Wisconsin Cent. R. Co. v. Price Co.*, *supra*, and there cannot be much doubt as to its force. In that case the supreme court in construing a grant in terms similar to that of plaintiff's said: "The grant was therefore, until such location, a float. But when the route of the road was definitely fixed the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant so as to cut off all intervening claims."

The same language is used in *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491. In the light of these decisions it was natural to suppose the court had said the land should be viewed when considering this question, at the date

of the grant. When that case came on for trial, the court instructed the jury that in his opinion the time when the land must be known to be mineral, to except it from the grant of the Central Pacific Railroad Company, must be, when the "grant attached," and that was, "when the line of the road was definitely fixed." This language is not in accordance, in my opinion, with the previous opinions of that learned judge, upon this subject, nor in accordance with that used in *Denny v. Dodson*, *supra*, where the court says: "The grant therefore is in the nature of a float, and the title does not become definitely attached to specific sections until they are capable of identification. But when they are once identified the title attaches as of the date of the grant." Nor in accordance with that used by the supreme court, in the case of *St. Paul, & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, (not yet officially reported.) In that case the supreme court says: "The route at the time, not being determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification, but when once identified, the title attached to them as of the date of the grant."

If there is any legal difference between the term, "the title attached by virtue of the grant," or "the grant attached," I have been unable to discover it. As the grant was one *in praesenti* it must have attached at its date, although the property conveyed by it was not identified, or described, until the route of plaintiff's road was definitely fixed. It can hardly be contended that the title to land within plaintiff's grant, concerning which there should arise no dispute as to its agricultural character, would attach as of the date of the grant, but that as to land which should be discovered to be mineral subsequent to the location of the fixed route of the road, it would attach when the line of that road should be definitely located, and not at the date of the grant. The act of fixing the definite line of plaintiff's railroad had no tendency to determine or identify the nature of the odd sections within plaintiff's grant, although it determined what odd sections were within the limits of that grant. This fixed route, was an object from which they could be ascertained, but not the character of these odd sections. The fixing of the definite line of plaintiff's road, was its own act, and a matter which involved no action on the part of the government. How then can it be said that at this time, any department of the government determined whether any given piece of land was mineral or not, or it was known to be mineral, or there was reasonable ground for believing it mineral? The view that in construing plaintiff's grant, we should insert

into the same, "was known to be mineral," or "there was reasonable ground for believing was mineral," or "it was apparently mineral at the time the route of plaintiff's road should be definitely fixed," involves more difficulties than the first construction discussed. The land department has no means of determining such facts. The issue would still be an open one to be determined by a jury. It seems to be contended that so much land might be found to be mineral within the limits of plaintiff's grant as to render the same worthless. When such proves to be the fact, there will be an occasion for considering this question.

The question as to whether the terms of this grant to plaintiff should have been so specific as to fully identify all lands excepted from the grant to the end that it might appear what lands were granted to plaintiff, is not a matter for judicial, but legislative, consideration. If the grant is too indefinite, that is a matter between congress, who made the grant, and plaintiff, who accepted it. If the terms of the grant do not fully identify the lands embraced, or sought to be embraced in a legislative grant, a court has no right to supply terms to remove the difficulty. As I have before shown, there are no implications to be indulged in, when construing a legislative grant. In interpreting a statute, a court ought not to consider what reasonable men should have intended when acting in a legislative capacity, but what they did intend, by the language used. Said the learned Justice FIELD, in *Hadden v. Collector*, 5 Wall. (U. S.) 107: "What is termed the policy of the government with reference to any particular legislation, is generally a very uncertain thing upon which all sorts of opinions, each varient from the other may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." When the language of a statute is free from ambiguity, the court has no right to consider the consequences of the act. The business of a court is not to improve, but interpret a statute. *Endl. Interp. St. p. 9, § 6.*

It appears to me, that the learned circuit judge, in this case has allowed himself to consider too much the consequences of interpreting the statute under consideration according to its terms, rather than the meaning of those terms. Consequences should be in the mind of the legislature. But if we are to consider the consequences of a certain interpretation, it does seem to me that the construction, that the land must be considered at the time of the definite location of the road, as to whether it is known to be mineral, or it is apparently mineral, or there is reasonable ground for believing it



to be mineral, would result in about as much dispute as to land-titles within plaintiff's grant, as any other construction that could be made. As I understand the learned circuit judge, he does not say, that the land must be known to be mineral by any particular person, or any one person must have reasonable ground for believing it to be mineral, or it must be apparently mineral to any one person at the time the definite route of the road is fixed, but if upon inspection by any experienced person, such would be found to be the condition of the land, it should be classed as mineral. Some of our experienced prospectors have great confidence in their ability to determine whether or not land is apparently mineral from a very casual observation of the same. In questions arising upon disputes upon this point their services would be in great demand. The surest means of quieting titles would appear to be, the determining the question of the mineral character of the land upon issuing of patents to the same. As I have said, this would be conclusive upon all subsequent purchasers. It is perhaps true, that if it was determined that land was mineral, which was in fact agricultural, the railroad company would not be precluded thereby, as it is a prior, not a subsequent purchaser, to the issuing of the patent. But there would not be as much litigation arising from this source, nor so much anxiety about titles therefrom, as from the construction that would leave it an open question as to whether land was known to be mineral, or there was reasonable ground for believing it mineral, at the time the route of the road should be definitely fixed. I do not think it can be maintained, that a patent would determine these questions. It could only determine the nature of the land at the date it is awarded. The land department has always acted upon this theory. For more than 20 years it has been the practice of the land department, to recognize mineral locations and issue patents for mineral land found within the limits of the Northern Pacific Railroad Company's grant upon odd sections which have been discovered to be such since the date of that grant, and for about 10 years since the date of the definite fixing of the route of plaintiff's road, sometimes these patents have issued without any reference as to whether they were for lands upon odd, or even sections, the general surveys of the government not having extended to such locations. The land department has thus left it to the prospecting minor, up to this date, to identify the mineral lands, which are excepted and excluded from plaintiff's grant. Until patents are issued which will identify the lands granted to plaintiff, the government can perform any acts it may think necessary to enable it to identify the mineral lands

excepted from plaintiff's grant, and the government can avail itself of all information given it, even by prospecting miners, which has resulted in disclosing and identifying mineral lands within the limits of plaintiff's grant. A long and uninterrupted practice under a statute, by the officers of the executive department of the government who are compelled to act under it, is entitled to great weight in construing it, and in cases of doubt is controlling. *McKeen v. Delancy*, 5 Cranch, (U. S.) 22; *U. S. v. Graham*, 110 U. S. 219; *The Laura*, 114 U. S. 411; *Brown v. U. S.*, 113 U. S. 568, 648; *Peabody v. Stark*, 16 Wall. (U. S.) 240.

The action of the land department, which has been called upon to act under the land laws of the United States, shows that it has never considered that lands which were not known to be mineral at the date of plaintiff's grant, or at the time the route of its road was definitely fixed passed with it. It has recognized the location for mining purposes upon mineral lands upon odd sections which has been discovered to be mineral since the date of that grant, and since the date of the fixing of the definite route of plaintiff's road, and as I have said, has not hesitated to award patents for such mineral claims. Some of the most valuable mining properties in this state are upon odd sections of land within plaintiff's grant, the mineral character of which was discovered since the said dates. The filing of the list by plaintiff of the lands claimed by it, and for which it desired a patent, in my judgment, constitutes no element in determining the question at issue. That was the act of plaintiff, and no action which would amount to a determination of the character of the land claimed, appears to have been taken by the land department, and there was no law authorizing such action in filing a list of lands by plaintiff.

For these reasons, I hold that the defendants having discovered that the premises in dispute were mineral land, had a right to locate them as such, and that they are not lands granted to plaintiff, and that the demurrer of defendants ought to have been sustained to plaintiff's complaint.

**Land Grants To Railroad Companies—Exception of Mineral Lands.**—See note 46 Am. & Eng. R. Cas. 454; *Francoeur v. Newhouse* (C. C.) 40 Am. & Eng. R. Cas. 439.

## DESERET SALT Co.

v.

TARPEY.

(142 U. S. 241.)

**Land Grants—When Title Attaches.**—The Act of Congress of July 1, 1862, granting land to the Union Pacific R. Co., transferred a present legal title as well as a beneficial title, and such title became attached to the specific sections of land as of the date of the grant when the lands were identified by the location of the road.

**Withholding Patents until Cost of Surveying is Paid.**—The amendment of 1864 to the Act of Congress of July 1, 1862, granting land to the Union Pacific R. Co., which directed the withholding of patents until the cost of surveying, selecting and conveying should be paid, did not alter the effect of the original grant; such amendment merely afforded a means of compelling the payment of such cost, and the patents issued were merely further assurances and evidence of the title granted by the Act.

IN error to the Supreme Court of the territory of Utah.

This is an action of ejectment by D. P. Tarpey, the plaintiff below, against the Deseret Salt Company, a corporation created under the laws of Utah, for certain parcels of land in that territory, described in the complaint as the "north-west quarter of fractional section nine, (9,) in township eleven (11) north, range nine (9) west, Salt Lake base and meridian, and the northeast quarter and the southwest quarter of said section, in part covered with water; in all, three hundred and eighty acres, more or less." The greater part of these lands lie on the border of Great Salt Lake, a body of water in that territory of nearly 90 miles in extent, and in breadth varying from 20 to 30 miles, which holds in solution a large quantity of common salt. The remaining lands in the section are covered by the lake. In 1875 one Barnes took possession of a portion of these lands, and began the construction of improvements and the erection of machinery to raise the water of the lake and conduct it into ponds or excavations, partly natural and partly made by him, for the purpose of evaporating the water by exposing it to the sun, and thus producing salt. He commenced manufacturing salt in this way in 1876 or 1877, and continued in the business until September, 1883, when he sold and transferred the lands and improvements to the defendant, the Deseret Salt Company, which at once went into possession, and continued in the manufacture. The plaintiff derives his title from the Central Pacific Railroad Company, a corporation of California, to

which a grant of land was made by the act of congress of July 1, 1862, embracing the premises in controversy. A greater part of its lands, lying in Utah, was leased by the company to the plaintiff on the 7th of August, 1885, for five years, for the annual rent of \$5,000, and in consideration of certain covenants in relation to the property which he undertook to perform. By one of these covenants he stipulated to begin to reduce the premises to possession, and to continue in that effort until he should be in the actual possession of the whole, and for that purpose to commence and prosecute any necessary or proper actions at law or other legal proceedings. This lease covered the premises in the controversy. On the 20th of October, 1868, the map of the definite location of the line of the railroad of the company to be constructed under the above grant was filed in the interior department, and accepted, as required by the act of congress. The premises in controversy constitute an alternate section of the land within 10 miles of the road, and its east, west, and north lines were surveyed by the United States in 1871. Its southern line, lying in the lake, had not been run. The selection list of lands for patent by the company, filed in the land office at Salt Lake City, which was produced in evidence, included the surveyed lands of the section, and showed that the costs of selecting, surveying, and conveying them had been paid. There was no evidence of any application for any other lands in the section, and no costs were paid or tendered for their selection, survey, and conveyance. The plaintiff also proved the incorporation in June, 1861, of the Central Pacific Railroad Company of California; its amalgamation and consolidation in June, 1870, with the Western Pacific Railroad Company, and, in August, 1870, with the California & Oregon Railroad Company, the San Francisco Oakland & Alameda Railroad Company, and the San Joaquin Valley Railroad. In the different articles of amalgamation a conveyance was made by the parties of their several interests to the new amalgamated company, as follows: "And the said several parties, each for itself, hereby, sells, assigns, transfers, grants, bargains, releases, and conveys to the said new and consolidated company and corporation, its successors and assigns, forever, all its property, real personal, and mixed, of every kind and description." These instruments were all properly recorded. The court informed the jury of the general nature of the grant to the company by the act of congress of July 1, 1862, and the amendatory act of July 2, 1864, and instructed them, substantially, that the line of the road which the company was to construct under the grant, became definitely fixed upon its filing with

the department of the interior its map of definite location, designating the general route of the road, and that thereupon the beneficial interest in the land vested in the company by relation back to the date of the act of congress; and that, as it was agreed that the lands in controversy were a portion of an odd alternate section within the 20-mile limit of the grant, they passed to and vested in the company at the time of the filing of that map, unless they had been previously sold, reserved, or otherwise disposed of by the United States, or a pre-emption, homestead, swamp land, or other lawful claim had attached to them, or they were known to be mineral lands, or as returned were such; and further, that the lease bearing date the 7th day of August, 1885, from that company to the plaintiff, for five years from the 1st day of January, 1886, gave to him the right of immediate possession of the lands, unless they were within some of the exceptions of the grant. The defendant company denied that the title to the lands in controversy had passed to the Central Pacific Railroad Company, the lessor of the plaintiff, and requested the court to instruct the jury that the plaintiff had not shown any grant or conveyance by deed or other written instrument sufficient to invest him with title to the lands. This instruction was refused, and the defendant excepted. The jury returned a verdict in favor of the plaintiff for the possession of the lands described in the complaint, and for \$500 for their use and occupation. Judgment being entered thereon, the case was carried to the supreme court of the territory, and there affirmed. From the judgment of the latter court the case is brought here on a writ of error.

*P. L. Williams*, for plaintiff in error.

*W. H. H. Miller* and *J. B. Cotton*, for defendant in error.

FIELD, J.—The only questions which appear in this case to have elicited much discussion in the court below relate to the title of the Central Pacific Railroad Company to the lands granted by the acts of congress of July 1, 1862, and July 2, 1864, upon the filing of a map of the definite location of its contemplated road with the secretary of the interior, and its acceptance by him. Was it sufficient to enable the lessee of the company to maintain an action for the possession of the demanded premises? The lessee can, of course, as against a stranger, have no greater right of possession than his lessor. On the one hand, it is contended with much earnestness that upon the filing of the map of definite location of the proposed road, and its acceptance by the secretary of the interior, a legal title vested in the grantee to the alternate odd sections, subject to various

Question presented.

conditions, upon a breach of which the title may be forfeited, but that until then their possession may be enforced by the grantee. On the other hand, it is insisted with equal energy that the grant gives only a promise of a title when the work contemplated is completed, and that until then possession of the lands cannot be claimed. An examination of the granting act, and the ascertainment thereby of the intention of congress, so far as practicable, will alone enable us to give a satisfactory solution to these positions.

The act of congress of July 1, 1862 (12 St. 489,) provides for the incorporation of the Union Pacific Railroad Company, and makes a grant of land to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean. Its provisions, grants, and obligations specially relate in terms to that company; but other railroad companies are embraced within the objects of the act, and the clauses mentioning and referring to the Union Pacific Railroad are made applicable to them. Thus by the ninth section the Central Pacific Railroad Company of California was authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, "upon the same terms and conditions in all respects" as were provided for the construction of the railroad and telegraph line of the Union Pacific. And by the tenth section of the act that company, after completing its road across California, was authorized to continue the construction of its road and telegraph line through the territories of the United States to the Missouri river, on the terms and conditions provided in the act in relation to the Union Pacific Railroad Company, or until its road should meet and connect with the road of that company. An equal grant of land, and of like extent and upon like conditions, was made to the Central Pacific Railroad Company of California as was in terms made to the Union Pacific Railroad Company. By the same law the rights and obligations of both must be determined. By the third section the grant was made. Its language is "that there be and is hereby granted, to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-

Act of 1862  
conveyed pre-  
sent title.

emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: provided, that all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company." The act of July 2, 1864, (13 St. 356, 357), enlarged the amount of the grant to 10 alternate sections on each side of the road. By the fourth section, as amended by section 6 of the act of 1864, it was enacted "that whenever said company shall have completed not less than twenty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn-outs, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the president of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that not less than twenty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as acquired by this act, then, upon certificate of said commissioners to that effect, patents shall issue, conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each twenty miles of said railroad and telegraph line are completed, upon certificate of said commissioners."

By the terms of the act making the grant the contention of the defendant is not supported. Those terms import the transfer of a present title, not one to be made in the future. They are that "there be and is hereby granted" to the company every alternate section of the lands. No partial or limited interest is designated, but the lands themselves are granted, as they are described by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions,—a position to be presently considered. In a great number of cases grants containing similar terms have been before this court for consideration. They have always received the same construction,—that, unless the terms are restricted by other clauses, they import a grant *in praesenti*, carrying at once the interest of the grantor in the lands described. *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733.

In *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496, 507,

41 Am. & Eng. R. Cas. 669, referring to the different acts of congress making grants to aid in the construction of railroads, we stated that they were similar in their general provisions, and had been before this court for consideration at different times; and of the title they passed we said: "The title conferred was a present one, so as to insure the donation for the construction of the road proposed against any revocation by congress, except for non-performance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant." As the sections granted were to be within a certain distance on each side of the line of the contemplated railroad, they could not be located until the line of the road was fixed. The grant was, therefore, in the nature of a "float;" but, when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title then attached as of the date of the grant, except as to such parcels as had been in the mean time under its provisions appropriated to other purposes. That doctrine is very clearly stated in the Leavenworth Case, cited above, where the language of the grant was identical with that of the one under consideration, and the court said: "'There be and is hereby granted' are words of absolute donation, and import a grant *in presenti*. This court has held that they can have no other meaning, and the land department, on this interpretation of them, has uniformly administered every previous similar grant. They vest a present title in the state of Kansas, [the grantee named,] though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and, by relation, has the same effect upon the selected parcels as if it had specifically described them." The terms used in the granting clause of the act of congress, and the interpretation thus given to them, exclude the idea that they are to be treated as words of contract or promise, rather than, as they naturally import, as words indicating an immediate transfer of interest. The title transferred is a legal title, as distinguished from an equitable or inchoate interest.

The case of *Rutherford v. Greene's Heirs*, 2 Wheat, (U. S.) 196, well illustrates the nature of the title. In 1782 the state of North Carolina passed an act providing "that twenty-five thousand acres of land shall be allotted for and given to Major General Nathaniel Greene" within the bounds of a tract reserved for the use of the army, to be laid off by commissioners designated in the act, as a mark of the high sense the state entertained of the extraordinary services of that



brave and gallant officer. The commissioners allotted the 25,000 acres, and in 1783 caused a survey of them to be made and returned to the proper office. One Rutherford claimed under a subsequent entry 5,000 acres of the tract, and instituted a suit to establish his claim. The case turned upon the validity of Greene's title, and the date at which it commenced. It was contended by Rutherford's counsel that the words of the act gave nothing; that they were in the future, and not in the present, tense, and indicated an intention to give in future, but created no present obligation on the state, nor present interest in Gen. Greene. But the court, speaking by Chief Justice MARSHALL, answered that it thought differently; that the words were words of absolute donation, not indeed of any specific land, but of 25,000 acres in the territory reserved for the officers and soldiers; that, as the act of setting apart that quantity to Gen. Greene was to be performed in the future, the words directing it were necessarily in the future tense, but that nothing could be more apparent than the intention of the legislature to order the commissioners to make the allotment, and to give the land, when allotted, to Gen. Greene. And the court held that the general gift of 25,000 acres, lying in the reserved territory, became by the survey a particular gift of that quantity contained in the survey; and concluded an elaborate examination of the title by stating that it was clearly and unanimously of the opinion that the act of 1782 vested a title in Gen. Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made and returned in pursuance of that act gave precision to that title, and attached it to the land surveyed. It would therefore seem clear that the title which passed under the act of congress by the grant of the odd sections became by their identification so far complete as to authorize the grantee to take possession and make use of the lands; and in the exercise of that authority the grantee took possession, from time to time, as the lands became identified by the location of the line of the road, and make sales of parcels of the lands, and executed mortgages on other parcels with sections of the road constructed, for the purpose of raising money to meet expenses already incurred, and which might thereafter be required for the completion of the road; and such mortgages were authorized by congress.

But it is contended that the natural import of the granting terms of the act is qualified and restricted by its fourth section, which as amended by the act of 1864, provides that upon the completion of not less than 20 consecutive miles of the road and telegraph line in the manner required, and their

acceptance by the president upon the report of commissioners appointed to examine the work, patents shall issue to the company conveying the right and title to said lands on each side of the road as far as the same is completed. The question naturally arises as to the necessity for patents if the title passed by the act itself upon the definite location of the road, when the alternate sections granted had become identified. We answer that objection by saying that there are many reasons why the issue of the patents would be of great service to the patentees, and by repeating substantially what we said on that subject in *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496, 510, 41 Am. & Eng. R. Cas. 669. While not essential to transfer the legal right, the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed. They would obviate the necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the lands were subject to the disposal of the railroad company, with the consent of the government. They would thus be, in the grantee's hands, deeds of further assurance of his title, and, therefore, a source of quiet and peace to him in its possession. There are many instances in the Reports, as there stated, where patents have been required and issued, although the title of the patentee had been previously recognized and confirmed. *Langdeau v. Hanes*, 21 Wall. (U. S.) 521, 529, is an instance of that kind. In that case there had been a previous confirmation to the heirs of one Tongas of a claim to a tract of land in the French and Canadian settlement of St. Vincents in the Northwestern Territory, conveyed by Virginia to the United States in 1793. This claim was confirmed by commissioners appointed by congress under the act of 1804, and their decision was confirmed by the act of congress of March 3, 1807, but no patent, for which this last act provided upon a location and survey of the claim, was issued for the tract at that time. One was, however, issued for it in 1872, upon a survey made in 1820, and the question was whether a new title was acquired by that patent, or whether the old title was good from the confirmation. It was held that the old title was good from the confirmation if the claim was to a tract of defined boundaries, or capable of identification; but if the claim was to quantity, and not to a specific tract, the title became perfect when the quantity was segregated by the survey of 1820; and to explain the subsequent issue of a

Effect of issuing patents for every twenty miles as work was finished..

patent in 1872 this court said: "In the legislation of congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government."

While a legal title to the sections designated, as distinguished from a merely equitable or inchoate interest, passed to the railroad company by the act of congress, upon the definite line of the road being once established, by which the sections could be ascertained and identified, the lands could not be disposed of by the company without the consent of congress, except as each 20-mile section of the road was completed and accepted by the president, so as to cut off the right of the United States to compel the application of the lands to the purposes for which they were granted, or to prevent their forfeiture in case of the company's failure to perform the conditions of the grant. The lands were granted to aid in the construction of the railroad and telegraph line, and it is manifest from different provisions of the act that congress intended to secure this application of them. Whatever disposition might be made by the company of the lands after they became, by the definite location of the road, capable of identification, they were subject to the control of congress, either to compel their application for the construction of the road contemplated, or to enforce their forfeiture if the road was not completed as required by the act. The application of the lands to the construction would not, of itself, operate to transfer the title; it would only remove the restriction upon the use and disposition of the title already possessed. But it is unnecessary to consider what power of disposition the company would possess in advance of the construction of the road, for that road was entirely completed years before the execution of the lease to the plaintiff in this case in August, 1885.

It is also urged that the title of the government to the lands in controversy was retained until the cost of selecting, surveying, and conveying the whole of them was paid. In support of this position the twenty-first section of the act of July 2, 1864, is referred to, which provides that before any land granted by the act shall be conveyed to any company or party entitled thereto there shall first be paid into the treasury of the

Cost of selecting and surveying.

United States the cost of surveying, selecting, and conveying the same. The object of this provision was to preserve to the government such control over the property granted as to enable it to enforce the payment of these costs, and for that purpose to withhold its patents from the parties entitled to them until such payment. The act of 1862, in its fourth section, as amended in 1864, speaks of patents issuing "conveying the right and title" to the lands upon the completion of every section of not less than 20 miles, to the satisfaction of the president; and the twenty-first section of the act of 1864 only directs the withholding of these evidences of the transfer of title until payment is made for the selection, survey, and conveyance of the land. Neither the issue of the patents nor any sale for taxes by state authority is permitted until such payment, thereby preserving unimpaired the lien contemplated. We do not think the provision was designed to impair the force of the operative words of transfer in the grants of the United States, or invalidate the numerous conveyances by sale and mortgage of the lands made by the railroad company with the express or implied assent of the government. Besides, in this case, the exterior limits of the section containing the lands in controversy, which are above the waters of the lake, were surveyed in 1871, and the costs of selecting, surveying, and conveying the legal subdivisions as described by that survey were paid at the time of selection by the company. The lines of the lands under the water have not been run, but are easily traceable by reference to the lines actually surveyed. The possession of the lands under the lake appears to have always accompanied the possession of the lands on its border. No contest was made against their recovery if a right of possession was shown to the border lands. From the view of the interest conveyed by the grant which we have expressed we are satisfied that the company could maintain an action for the possession of the premises in controversy, and that its lessee, the plaintiff herein, was possessed of the same right.

The judgment must, therefore, be affirmed.

**When Title to Land Granted Vests—Performance of Conditions.**—Act Cong. May 12, 1864, granted lands to the state of Iowa "for the purpose of aiding in the construction of a railroad," specifying the route thereof. Section 3 of the act provided that the land should be subject to the disposal of the legislature of Iowa, "for the purpose aforesaid and no other." Section 4 provided that the land should be patented to the state in specified quantities, as the work of building the railroad progressed; that, in case of failure to complete the road within a specified time, the state should resume the lands, and dispose of them to aid in building the road; and that, on the state's failure to complete the road within a specified time thereafter, the land should revert to the United States. By Acts Iowa,

1866, chap. 134, the state of Iowa accepted the grant, and conferred the land on a certain railroad company, subject to the conditions of the grant. *Held*, that such company acquired no legal title to the lands, by virtue of the grants, until it earned them by performance of the conditions. *Bowne v. Bilsland* (Iowa, June 1, 1891), 49 N. W. Rep. 161. *Ayres v. Kalstrom* (Iowa, Dec. 16, 1891,) 50 N. W. Rep. 550.

**When Government Patent Takes Effect.**—The government patent to land issued under the act of congress of July 1, 1862, and the several acts amendatory thereof, to aid in the construction of a Pacific Railway, etc., takes effect by relation as of the time when the railway company definitely fixes the line of its road by filing the map thereof in the office of the commissioner of the general land-office. *Howell v. Killie* (Colo. Nov. 30, 1891) 28 Pac. Rep. 464.

**Donation of Swamp Lands to Railroad Company—Contract with County.**—A county and a railroad company entered into a contract reciting that the county sold to the company its swamp lands at the price of \$1.25 per acre; that a deed of the lands to the company had been placed in escrow; that the company proposed to do certain work, to drain, reclaim and protect said land for a sum equivalent to the price of the land, and that said proposed work would open up for settlement and cultivation a large portion of the southern part of the county, and also promote the health of the county by a drainage of said lands. The contract further provided that, in consideration of the premises and other valuable considerations, the county agrees to pay the company the price of the lands so sold, and that a deed therefor has been placed in escrow to be delivered to the company on the completion of the work. The company on its part agreed to build a levee across the swamp of a specified width and to operate a railroad thereon; and also to open continuous ditches along said levee on both sides, if necessary to drain the land, the company to have the right to leave openings in the embankment whenever it saw fit, putting trestlework in place thereof, and agreeing to drain the surface water when necessary into the places where it erected trestlework. *Held*, that the contract was merely a donation of the lands to the company in consideration of building and operating its road, and not a contract to deed swamp lands as payment for reclaiming them. *Cape Girardeau S. W. R. Co. v. Hatton*, 102 Mo. 45.

**Suit to Quiet Title to Land Granted.**—The rule that a suit to quiet title can only be maintained upon the legal title does not apply as against a railroad company, with respect to lands granted to it by the government, when it has done everything required to entitle it to the grant, since it is powerless to compel the government to issue a patent therefor. *Southern Pac. R. Co. v. Stanley* (C. C. S. D. Cal.) 49 Fed. Rep. 263.

**Same—Limitation of Action—Interest of United States—Laches.**—In an action to quiet title to railroad grant lands, in respect to which the company has performed all the requisite conditions, and has constantly sought, without success, to obtain a patent, against one claiming under a state patent issued as for lands selected in lieu of other grants, the United States being legally liable to make the company's title good, has such an interest in the suit, although not a party, as will prevent limitation from running against the company's cause of action. In such an action no laches can be imputed to the company with respect to time passing between the date of the grant and the time of complete performance of the conditions thereof; for, though the title passes as of the date of the grant, it only does so by relation, upon the performance of the conditions, and before performance no such suit could be maintained. *Southern Pacific R. Co. v. Stanley* (C. C. D. Cal.) 49 Fed. Rep. 263.

## GALVESTON, HARRISBURGH &amp; SAN ANTONIO R. CO.

v.

STATE.

*(Texas Supreme Court, June 2, 1891.)*

**Forfeiture of Corporate Charter—Failure to Construct Road.**—The forfeiture of the charter of a railroad company cannot be claimed in a proceeding by the state to recover lands granted to such company, merely because the company has failed to construct its road within the prescribed time, in the event of which it was provided that "this charter shall be forfeited."

**Land Grant—Companies Entitled to Benefit of Act—Failure to Complete Road in Time.**—Under a statute granting to railroad companies a certain amount of land for each mile of road completed, "provided, that the act shall not be construed to renew or continue any right to companies which have failed or may fail to complete their roads within the time specified in their charters," a railroad company which had previously acquired no right to public lands under its charter, and which had failed, after the passage and before the taking effect of the act, to complete its road in the time required by its charter, is not excluded from the benefit of such act.

**Same—Land Certificate Based on Length of Switches and Side Tracks.**—An act granting to certain railroad companies, on the completion of a section of ten miles or more of road, sixteen sections of land for each mile of road so completed, attaches only to continuous sections of the main line, and land certificates based on the length of switches and side tracks are voidable. The courts in such cases are not governed by the construction placed upon the statute by the executive department in state government. But the fact that the land certificates did not distinguish between lands granted for mileage of the main line and those granted for the switches and side tracks, does not justify the court in holding the certificates void, there being no concealment or fraudulent device.

APPEAL from Val Verde District Court.

*E. P. Hill*, for appellant.

*Chas. A. Culberson*, Atty. Gen., for the State.

**GAINES, J.**—This suit was brought by the state of Texas, through its attorney general, to recover of the appellant corporation 60 sections of land which had been located and surveyed for it by virtue of 60 alternate certificates issued July 12, 1877, to the company by the commissioner of the general land office. The grounds of action, as alleged in the original petition, are as follows: "(1) That said certificates were claimed to be issued and located, as shown upon their faces, in accordance with the provisions of an act 'to encourage construction of railroads in Texas by donations of land,' approved January 30, 1854, and acts amend-

Case stated.

atory thereof; all of which said laws had expired by their own terms and limitations, and were repealed by other acts of the legislature, and by the constitution of 1869, before the road for which said certificates were issued was constructed. (2) That the company, in procuring said certificates, represented, and on said representation obtained them for and on the ground, that said company had completed, at the date of their issuance, a section of thirty-six miles and 1,474 feet of main track from the Gaudalupe bridge to San Antonio, and two miles and 2,000 feet of sidings and switches at other points on its line, making a total of thirty-eight miles and 3,474 feet of railroad. That on this representation and statement, which were untrue, the certificates were issued. That there were not then, in fact, nor have there ever been, thirty-six miles and 1,474 feet of main track between said Gaudalupe bridge and San Antonio; but that the distance between those points has always been, and is now, along the main track of said railroad, only thirty miles and 1,205 feet, which said company then and has always known. That for the said distance of thirty miles and 1,205 feet of main track the defendant company falsely, fraudulently, and unlawfully obtained, received, and appropriated to its use sixteen land certificates of 640 acres each to the mile for thirty six miles and 1,474 feet of alleged main track, as shown upon the face of said certificates; and in that way unlawfully and fraudulently received sixteen sections of 640 acres of land each to the mile for six miles and 269 feet more from the state than the actual mileage of said road between the said Guadalupe bridge and San Antonio. (3) That the two miles and 2,000 feet of sidings and switches called for in, and shown on the face of, said certificates belonged to and were a part of other sections of defendant's road at the following points, to wit: At Flatonia, 1,200 feet; at Quarry track, near Flatonia, 6,600 feet; at Eagle Lake, 500 feet; at New Philadelphia, 1,400 feet; at Pierce Junction cattle track, 1,460 feet,—making a total of siding and switches of 12,560 feet, or two miles and 2,000 feet. That, of the thirty-six miles and 1,474 feet mentioned and represented on the face of the certificates as main track, six miles and 269 feet of the same were in truth and in fact not main track, but sidings and switches at points between the Guadalupe bridge and San Antonio. That the certificates hereinbefore mentioned and described were in fact issued for eight miles and 2,269 feet of switches and side tracks, for the construction of which the said company was not entitled to aid from the state in any amount or quantity of land, either under general or special laws. (4) That said railroad was constructed and completed westward from Guadalupe bridge to San Antonio, as afore-

said, between the 17th day of November, 1876, and February 13, 1877; and the said two miles and 2,000 feet of sidings and switches mentioned in said certificates were built by said company between April 1, 1870, and April 18, 1876, and were the side tracks, switches, parts, parcels, and appurtenances of and belonging to other portions and sections of defendant's railroad, at the points hereinbefore named, lying eastward of said Guadalupe bridge; for the construction of which said company had, at other and previous times, unlawfully obtained, received, and appropriated from the state sixteen sections of land to the mile thereof. (5) That six miles and 269 feet of sidings and switches called for and contained within, not shown upon the face of, the aforesaid certificates, but for which they were to that extent issued, and also the two miles and 2,000 feet of siding and switches shown upon the face of said certificates, and for which they were issued, were at the time of the issuance of said certificates, and at all other times prior to and since said dates, necessary appurtenances to, and adjuncts and parts of, the defendant's railway, and were essential to the use and operation of said railway. That said railway at no time was or could have been complete and in good running order without said sidings and switches. That without them said road was not substantially built or fully equipped for the transportation of passengers or freight, or either; nor would said road, without them, have been constructed in accordance with its charter, or the general laws in force in this state regulating railroads. (6) That it cannot be ascertained from the face of said certificates, or from the location and survey of said lands, or by any other means, which of these certificates were issued, located, or surveyed exclusively on account of the main track of said railroad." The prayer of the petition was for a recovery of the lands and a cancellation of the certificates.

The defendant company in a special answer denied that in procuring the certificates it had misrepresented the number of miles of main track and the number of miles of side track for which they were issued, and alleged that they were issued upon a correct report made by the engineer of the state, and approved by the governor, and that by a clerical error which was made in the land-office an erroneous recital as to the respective numbers were inserted in the face of the certificates. The answer contained other averments, which it is not necessary to notice. A supplemental petition was filed on behalf of the state, which contained these allegations: "State says the defendant was never entitled to receive the lands in controversy, or any other lands, in aid of constructing its railway west of Guadalupe bridge, for the reason that by the terms



of its charter, passed July 27, 1870, and the amendment passed March 10, 1875, (mentioned in plaintiff's petition), which were referred to and made a part hereof, it was required and undertook to complete its said railroad to San Antonio on or before January 28, 1876, conditioned that in the event of its failure to do so it should forfeit all the corporate rights, powers, and privileges therein conferred. That it failed to so construct or complete its said road to said place within said time on or before January 28, 1876, and therefore it *ipso facto*, by the terms of its said charter contract, which the state here specially interposes, pleads and demands to be enforced, lost and forfeited all its rights, and all privileges, immunities, and grants of land, if any it ever had, held, or was entitled to, by virtue thereof." Under the rules of practice prescribed by this court, these averments would properly have been made as amendments to the original petition; but they were not excepted to on that ground, and the objection is deemed to have been waived.

The case was tried before the judge without a jury, upon an agreement, as to the principal facts, which is as follows: "(1) That defendant received from the state 619 landscript certificates, for 640 acres each, all of which is located on public domain, each of said certificates being in form and substance as 'Exhibit A,' hereto attached. (2) That the defendant's main line of track from Guadalupe bridge west to San Antonio, mentioned in each of said certificates, is thirty miles and 1,205 feet, and the sidings and switches between same points is six miles and 269 feet, as will more fully appear by 'Exhibit B,' attached hereto. (3) That the two miles and 2,000 feet of sidings and switches mentioned in each of said certificates were east of Guadalupe bridge, as more fully appears by 'Exhibit C,' hereto attached; and that prior to the issuance of said certificates the defendant or its predecessor received sixteen sections of land, of 640 acres each, for the main track, to which said sidings and switches belonged, east of said Guadalupe bridge. (4) That the lands described in plaintiff's petition were located, and are now held without patents by the defendant by virtue of said certificates, according to the number and description set forth in said petition. (5) Correspondence between Governor Hubbard and Attorney General Boone, hereto attached, marked 'Exhibit D,' may be introduced subject to objections as to its legal effect. (6) The charters and special laws relating to defendant company may be used on the trial in evidence. (7) Any other pertinent fact may be introduced in evidence by either party on the trial. (8) That there now remain belonging to the state four million and a half acres of

the public domain, reserved since 1879 from locations by certificates, and was at the time of the completion of said road to Del Rio. (9) That defendant paid taxes on the lands sued for continuously since they were located up to the present time. (10) That defendant paid all fees for surveying and locating said lands sued for, as well as the same number of alternate sections known as 'even numbers,' for public free school fund. (11) The various engineers appointed by the different governors to inspect railroads as the same were constructed, in their respective reports of inspection to the respective governors, stated the number of miles and feet of main track; the number of miles and feet of sidings; the number of miles or feet of bridges, culverts, and trestles; the number of depots, cars, engines, weight of iron; and width and character of track and grade. The action of the respective governors (except Governor Roberts) in said reports, were usually in the following words: 'Report examined and approved;' upon which reports and action of the respective governors the commissioner of the general land office issued to the respective companies certificates for main track and sidings in form as shown in 'Exhibit A.' During the administration of Governor Roberts, the reports of the engineers were in substance and form of those made to other governors, but he approved for only the number of miles of main track stated in the reports. In one instance during the administration of Governor Davis, he approved one report for sidings exclusively, for which certificates were issued in the usual amount per mile. This was also done in one instance by Governor Hubbard, as shown by 'Exhibit C,' for which certificates were issued. On March 13, 1877, Governor Hubbard made the following indorsement on one of the reports: 'This report of Inspector Gray examined and approved for 30 miles main track and sidings as being made, graded, and in all respects complying with the law.' (12) Exhibits 'E' and 'F' are copies of letters of Governor Coke, written to commissioner general land office; and 'G,' letter of Gov. Pease, March 30, 1856, to commissioner general land office; and 'H' March 24, 1856, Tipton Walker to Governor Pease,—to be introduced. (13) That the road of defendant from Guadalupe bridge to San Antonio, for which the certificates described in the petition were issued, was constructed and completed between November 17, 1876, and February 13, 1877. That the two miles and 2,000 feet of sidings east of Guadalupe bridge were constructed and completed subsequent to October 31, 1876, and prior to February 13, 1877. This admission is subject to correction by defendant as to

dates." The following is so much of the form of the certificate referred to in the above statement as is material: "No. 1,621. Land Scrip. 640 acres. The state of Texas, general land office. Austin, Texas, July 12th, 1877. This certificate entitled the Galveston, Harrisburg and San Antonio Railway Company to six hundred and forty acres of land, to be located upon any of the vacant and unappropriated public domain of the state of Texas, in accordance with the provisions of an act to encourage the construction of railroads in Texas by donations of land, approved January 30th, 1854, and acts amendatory thereof. Information having been received, as required by said act, that said company has completed a section of thirty-six miles and fourteen hundred and seventy-four (1,474) feet of main track from the Guadalupe bridge to San Antonio, and two miles and two thousand feet of sidings and switches, making a total of thirty-eight miles and thirty-four hundred and seventy-four feet of railroad, in accordance with the provisions of its charter and general laws regulating railroads," etc. The exhibits attached to the agreement are incorporated with it in the statement of facts, but their contents need not be set out in this connection.

The judgment was that the state recover the lands, and that the certificates be canceled. It was predicated upon the following findings of fact and conclusions of law: As matters of fact the court found: "(1) That defendant constructed its line of railway from the Guadalupe bridge west to San Antonio; that the distance between these points of railroad is thirty (30) miles and 1,205 feet of main track, and the sidings and switches between the same points are six miles and 269 feet. (2) That defendant railway also constructed two miles and 2,000 feet of sidings east of the Guadalupe bridge. (3) That defendant received from the state sixteen land certificates for 640 acres of land for each mile of the main track mentioned above, and sixteen land certificates for 640 acres each for each mile of its sidings and switches mentioned above; all of which have been located upon the public domain, included in which are the sections sued for. (4) That the certificates show on their faces that they were issued for main track and for sidings and switches, but do not show which certificates were issued exclusively for main track, and which were issued exclusively for sidings and switches." The court also concluded as matters of law: "(1) That the law granting lands in aid of railroads did not grant certificates for sidings and switches, but for main track only. (2) The certificates, showing on their faces that they were issued for sidings and switches as well as for

main track, were issued without authority of law. (3) That the state is entitled to judgment canceling the certificates and recovery of the land."

The appellant assigns—*First*, that, "the court erred in its conclusions of law in holding that the laws granting lands to railroads did not grant lands for sidings and switches, but for main track only;" and *second*, that it "erred in adjudging the land certificates to be null and void, and that they be canceled and held for naught." Assignment of errors. The findings of fact are not called in question upon this appeal. The attorney general, however, submits, in effect, that, by reason of its delay in constructing its road to San Antonio, the appellant did not acquire the right to any lands, and that the judgment should therefore be affirmed without reference to the correctness of the legal conclusions announced by the judge. If the judgment be correct, the fact that the court gave a wrong reason for it is not a ground for its reversal. The right of the company to receive certificates for the extension of its road is the foundation of its claim; and whether such was its right or not is logically the first question in the case, and will be the first determined. Before proceeding to the discussion, it is to be remarked that we construe the agreement as to the facts to mean that the special acts of the legislature bearing upon the questions involved are to be considered as if offered in evidence before the court, and to be treated as laws of which the court takes judicial knowledge. The briefs of counsel refer to them freely, and no objection is made from either side.

The certificates in controversy in this case purport upon their face to have been issued by virtue of the act of January 30, 1854, and acts amendatory thereof; but the attorney general contends, and counsel for appellant seems to concede, that the authority to issue the certificates, if it existed at all, was conferred by the act of August 16, 1876. Laws 1876, p. 153. The attorney general insists, however, that before this act took effect the appellant's charter had been forfeited and had become void, and that it had been thereby rendered incapable of receiving a grant of lands. If the charter had become void at the time the act of August 16, 1876, went into effect, it may be readily conceded that the company acquired no right under that act. By a special law passed July 27, 1870, entitled, "An act supplementary to an act to incorporate the Buffalo Bayou, Brazos & Colorado Railroad Company, and to the other special acts relating to said company," the present corporation was recognized as the successor by a foreclosure sale to the property and franchises of the original corporation named in the title, and the name was changed

to that of the "Galveston, Harrisburg and San Antonio Railway Company." Section 3 of that act provided: "That said new company is hereby authorized to extend the existing line of railroad owned and operated by said company from Columbus, in Colorado county, to San Antonio, in the county of Bexar, within four years from the passage of this act, and thence to the terminus on the Rio Grande by such route as the directors shall deem most feasible, with a branch from the most suitable point to New Braunfels, in Comal county, within four years from the passage of this act; or said new company may connect with any line of railroad that may be constructed or under construction to San Antonio or the Rio Grande, south of the latitude of the city of Austin and the Colorado river, instead of building its own line beyond the point of such connection, and may build it, and connect with any line of railroad that may be constructed or under construction, and designed to form a part of any railroad line to the Pacific south of the thirty-fifth parallel of latitude; nothing herein being so construed as to exclude said new company from the right to construct, also, any part of the line up the Colorado valley, formerly designated by said 'sold-out' company as its route under the provisions of the eleventh section of the act of December 19th, 1857; provided, that if the said road shall not be completed within the time specified in this section, then this charter shall be forfeited." Sp. Laws 1870, p. 45. By this it will be seen that the company was required to construct its road to San Antonio on or before the 27th day of July, 1874, upon penalty of forfeiting its charter. But by a special act, passed March 10, 1875, the time was extended to the 28th day of January, 1876. By virtue of "An ordinance in relation to railroads," passed by the convention of 1875, the time was, in effect, again extended until the adjournment of the next legislature. 4 Sayles, St. 599. That adjournment took place on the 21st day of August, 1876. Laws 1876, p. 321. The appellant's road was not completed to San Antonio by the last-named date, and it is insisted that by reason of the company's failure in this respect its charter *ipso facto* ceased to exist.

**Forfeiture of  
charter—Col-  
lateral pro-  
ceeding.**

It is universally held as a general rule that the forfeiture of the franchises of a corporation cannot be claimed, in a collateral proceeding, merely because a ground of forfeiture may exist. The forfeiture must be declared in a judicial proceeding instituted for the purpose. Whether such proceeding shall be taken or not depends upon the will of the state, for it has the election to enforce the forfeiture or to waive it. When the rights of the corporation come into inquiry in a collateral proceeding, the case is to be

treated as if no ground of forfeiture existed, unless there has been a judgment so declaring in a direct action by the state. *Moseby v. Burrow*, 52 Tex. 396; *In re Elevated R. Co.*, 70 N. Y. 337; *Montgomery v. Merrill*, 18 Mich. 343; *R. Co. v. Johnson*, 49 Mich. 148; *Stoops v. Greensburgh & B. Plank Road Co.*, 10 Ind. 47; *Heard v. Talbot*, 7 Gray, (Mass.) 113; *Bohannon v. Binns*, 31 Miss. 355; *Baker v. Backus' Adm'r.* 32 Ill. 79; *Dyer v. Walker*, 40 Pa. St. 157; *West v. Citizen's Ins. Co.*, 31 Ark. 476; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224; *Enfield Toll-Bridge Co. v. Connecticut River Co.*, 7 Conn. 45; *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71. This rule applies as well when the ground of forfeiture is expressed in the charter as when it is merely implied, as some of the cases cited will show.

We do not mean to assert that the state, in granting a charter, cannot prescribe conditions, upon the performance of which the continued existence of the corporation may be made to depend, and that it cannot make the failure to perform the conditions operate of itself, and without judicial action, a divestiture of the corporate privileges. A compliance with the conditions prescribed by article 4278 of the Revised Statutes in reference to railroad companies organized under the general law was held by this court necessary to prevent a termination *ipso facto* of the corporate existence, in whole or in part, of such companies. *Bywaters v. Paris & G. N. R. Co.*, 73 Tex. 627, 38 Am. & Eng. R. Cas. 498. The words, "forfeit its corporate existence, and its powers shall cease," etc., in the article cited, were held to import that the provision should be self-executing. Similar language in the statutes of other states has received a like construction. *Oakland R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365; *In re Brooklyn, W. & N. R. Co.*, 72 N. Y. 245. When apt words are used to express the intention that the forfeiture shall take place upon the happening of a contingency without the necessity of a judicial declaration, then the courts will give effect to that intention whenever the question is presented in a judicial inquiry. But the language employed in the charter under consideration is that, upon the failing of the company to construct its road to San Antonio within the prescribed time, "then this charter shall be forfeited." It is to be noted that the language quoted neither prescribes nor indicates the manner of forfeiture. In cases where such words are employed, the uniform construction is that they prescribe a ground of forfeiture, and that the manner must be by a judicial proceeding instituted directly for that purpose. We doubt if any case can be found in which the words, "shall for-

When provision for forfeiture is self-executing.

feit its charter," or "its charter shall be forfeited," have been construed to provide a forfeiture which is to take effect by the mere happening of a contingency. In that connection the term "forfeit" has been imbued with a technical signification, and is the word universally used in charters for prescribing the grounds upon which a judicial forfeiture may be claimed. This is illustrated by the article of the Revised Statutes above cited, (article 4278), and article 4280 in the same chapter. Article 4278 provides that, upon the failure of the railroads organized under that title to build certain sections of the road as therein provided, the corporation shall "forfeit its corporate existence, and its powers shall cease as far as it relates to that portion of said road then unfinished, and shall be incapable of resumption by any subsequent act of incorporation." Article 4280 provides that any railroad corporation that shall neglect to make its annual report as required by law, after being notified by the comptroller, "shall forfeit its charter." The change in the language clearly shows the intention of the legislature. By the former article it intended to provide a forfeiture without judicial action, for a failure to complete so many miles of railroad within stated periods. By the latter the intention was to prescribe merely a ground of forfeiture, which the state could enforce, should it so elect, by a direct proceeding in a court of justice. The supreme court of Massachusetts have held that where a charter provides that, in case the corporation fails to comply with its provisions, "this corporation shall thereupon cease to exist," it can only be determined that it has ceased to exist in a suit brought directly to declare the forfeiture. *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71, and cases cited. This is in conflict with the decision of this court in *Bywaters v. Paris & G. N. R. Co.*, *supra*, from which we have no disposition to recede; but it supports our conclusion as to the effect of the words, "then this charter shall be forfeited," in the special act of incorporation now under consideration.

For the reasons given, we conclude that the appellant must be treated as operating under an existing charter on the 19th day of November, 1876, the day on which the act of August 16, 1876, went into effect. This brings us, then, to the construction of that act. Omitting certain provisions which throw no light upon the questions before us, the act reads as follows: "That any railroad company heretofore chartered, or which may be hereafter organized under the general laws of this state, shall, upon the completion of a section of ten miles or more of its road, be entitled to receive, and there is hereby granted to

Construction  
of proviso in  
act of 1876.

every such railroad, from the state, sixteen sections of land for every mile of its road so completed and put in good running order: \* \* \* provided further, that this act shall not be construed to renew or continue any right to companies who have failed or may fail to comply with the terms of their charters, with reference to the completion of portions of their roads in stated times; provided, further, that the provisions of this act shall not be so construed as to grant the aid herein provided for to any railroad that has already received, or is otherwise entitled to receive, aid from the state to the amount of sixteen sections of land to the mile."

It is clear, we think, that the appellant company is included within the meaning of the words, "any railroad company heretofore chartered," and that it was entitled to receive lands for portions of its road constructed after the act went into effect, unless it be excluded by the first proviso which appears in the section quoted. The construction of that act, as applicable to the work done by the appellant company, presents a serious difficulty. We think the proviso should be construed as if it read: "This act shall not be construed to renew any right to companies that have heretofore failed, or to continue any right to companies that may hereafter fail, to comply with the terms of their charters," etc. If the company had ever had the right to a grant of lands for constructing its road to San Antonio, having at the time the act took effect failed to comply with the law for building to that point within the time fixed by its charter and the acts amendatory thereof, and the general laws which granted relief to railroad companies in that particular, it was in effect excluded by the proviso from the benefit of the act. The Buffalo Bayou, Brazos & Colorado Railroad Company had had by special acts, and by the general law of 1854, the right to receive lands for each section of 25 miles of railroad constructed; but by a special act passed February 4, 1854, it was restricted to an extension of its road to Austin, and to a line extending thence to a connection with any road running north of Austin to the Pacific ocean. Sp. Laws 1854, pp. 69, 70. The privilege of constructing a railroad to San Antonio was conferred by the special act of 1870, which recognized the present corporation as the successor of the Buffalo Bayou, Brazos & Colorado Railroad Company, and authorized the change of name. At the date of that act the power to grant lands in aid of the construction of railroads had been taken from the legislature by the constitution of 1870, and all laws making such grants impliedly repealed, except as to existing rights. Const. 1870, art. 10, § 6. It follows that until the act of 1876 went into effect the appellant



had never had any right to acquire lands from the state by the construction of its line to San Antonio, and consequently there was no right in that respect which but for the proviso in question would have been renewed.

Does, then, the appellant corporation come within the meaning of the words "companies who \* \* \* may fail," as found in the proviso? If the statute is to be construed as speaking from the time it took effect, and not from the date of its passage, then the appellant is not included. It had already failed to comply with the law with reference to building to San Antonio when the act went into effect. At the date of the passage of the statute it had not failed. It still had until the adjournment of that session of the legislature to complete its road to the point named in compliance with the laws. We apprehend that no universal rule of construction can be adopted when a statute, which makes a distinction between future and past transactions is passed upon one day to take effect upon another; but we think the general rule is that a statute speaks from the time it becomes a law, and what has occurred between the date of its passage and the time it took effect is deemed, with respect to the statute, a past transaction. This is by analogy to the rule for the construction of wills, *Price v. Hopkin*, 13 Mich. 318; *Charless v. Lamberson*, 1 Iowa, 442; *City of Davenport v. Davenport & St. P. R. Co.*, 37 Iowa, 624; *Gilkey v. Cook*, 60 Wis. 133; *Jackman v. Garland*, 64 Me. 133; *Evansville etc. R. Co. v. Barbee*, 74 Ind. 169, 6 Am. & Eng. R. Cas. 580. This rule should not be applied when the language of the act shows a contrary intention. But we find nothing in the statute under consideration which evinces an intention that the date of its passage, rather than that on which it was to take effect was to be considered the dividing point between the future and past failures contemplated in the proviso.

Our conclusion being that the appellant company had never acquired any right to earn lands by the construction of this particular line of road before the passage of the act of August 16, 1876, and having already failed to construct to San Antonio within the time required by its contract and the general laws of the state, it follows that the privilege conferred by that act was neither a renewal of a lost or forfeited right nor the continuance of one existing when the act took effect. The appellant therefore is not excluded by the letter of the statute from benefits conferred by it. Whether it comes within the spirit of the proviso or not is not so clear. The legislature may have intended to exclude from participation in the land grant all companies that had made default in the particular mentioned in the

proviso, or it may have intended to exclude only those in default to whom the state's bounty had been extended. There was reason for making a distinction between those who had failed without the land grant and those who defaulted notwithstanding the very liberal terms which had been offered them by the state as an inducement to complete their works in accordance with the terms of their charter. The default of such companies was of a graver character than that of those to whom the right to acquire lands had never been extended. The provision in reference to companies that had an existing right to acquire lands, and that might fail in future, is in harmony with the same idea. Being aided by a grant of lands, they were required to build in accordance with their charters, under penalty, in case of default, of losing the benefits of the act. For these reasons we strongly incline to the opinion that railroad companies, who had failed to comply with the law in regard to the construction of their roads within specified times, and who had not been entitled to participate in the state's bounty, were not intended to be excluded from the benefits of the statute under consideration. But it may also be remarked that in the years 1875 and 1876 the people of those sections of the state which were still without railroads complained loudly of the policy which had led to the prohibition of grants of the public domain to aid in the construction of these public improvements; and that they condemned as unfair the repeal of the law before their portions of the state had enjoyed any benefit from it in the way of securing facilities of transportation. The complaint was certainly well founded; and it may be that those considerations may have induced the legislature to determine to deprive no company with an existing charter of the benefits of the act, to whom a right to acquire lands had never been extended. But, whether we are correct or not in these conclusions, there is certainly such doubt about the meaning of the proviso in question as to justify us in calling in aid the practical construction placed upon it by the executive department of the government. The evidence in the case shows that the certificates were issued upon the report of the state inspector, which was approved July 9, 1877, by R. B. Hubbard, then the governor of the state. The governor, before acting upon the report, requested the opinion of the attorney general upon the question of the right of the company to receive lands under the act of August 16, 1876, and called attention to the fact that the company had failed to complete its road to San Antonio within the time prescribed in its charter. The opinion of the attorney general was that the company was entitled to receive certificates for lands under the act in question.

It appears incidentally in the correspondence between Gov. Hubbard and the attorney general that the immediate predecessor of the former had made the same ruling.

We are brought, then, to the original question in the case: Did the act of August 16, 1876, entitle the appellant company to receive lands for the construction of its sidings?

Right to  
lands for  
construction  
of sidings.

The language of the statute, in so far as it bears upon this question, is "that any railroad company heretofore chartered, or which may be hereafter organized under the general laws of this state, shall, upon the completion of a section of ten miles or more of its road, be entitled to receive and there is hereby granted to every such railroad from the state sixteen sections of land for every mile of its road so completed and put in good running order." As we view the provision, a solution of the question will be facilitated by first determining what is meant by the words, "a section of ten miles or more of its road." When we speak of a section of 10 miles of railroad do we mean 10 miles of road in lineal extension, or do we mean 10 miles of track, made up together of the main line and of side tracks used in connection with it? Could a railroad company claim lands under the act for the completion of eight miles of line of road and two of side track? Each of these questions fairly admits of but one answer. A section of 10 miles of a railroad obviously means a section of its road extending 10 miles in continuous line. Less than 10 miles of the line of the road, with sufficient side track used in connection therewith to make up 10 miles, do not constitute a section of 10 miles of railroad. A section of 10 miles means a section 10 miles long; and it cannot, without doing violence to the words, be tortured into meaning anything else. This is too plain to admit of argument. Having determined that a section of 10 miles means a portion of the line of the road 10 miles in continuous length, we then have the question, what is meant by the subsequent words, "be entitled to receive \* \* \* sixteen sections of land for every mile of its road so completed," etc.? Does it mean that the companies were to receive lands for every mile of such section, or does it mean that they were entitled to receive them not only for every mile of the section, but also every mile of sidings constructed therewith? We are of the opinion that the former is the only proper construction that can be given to the words. Upon the completion of a section of 10 miles or more of railroad, the companies are to receive a certain quantity of land for every mile of the road so completed. The words "every mile of the road so completed" clearly refer to the section,

and nothing else. Can it be contended that, upon the completion of a section of 10 miles, a company would be entitled to receive lands for every mile of road completed by it on some other portion of its lines, and, if not, upon what theory can side tracks be construed to be within the purview of the statute, when they are not mentioned by the distinctive appellation by which they are commonly known? It is true that side tracks are necessary appurtenances to every railroad, constructed for public use; but the deduction from this is not that the legislature intended to grant lands for their construction, in the absence of words in the statute evidencing that intent. It is, rather, that it was intended to evidence by a compensation in lands the construction of the line of railroad proper, knowing that the construction of the sidings would follow as a necessary incident of the main enterprise. It was not the purpose to confer a mere bounty. It was to grant lands as a consideration to induce the extension of existing lines of railway and the construction of new lines. The good to be accomplished was not the increase of railroad facilities by the construction of said tracks, but the projection of the railroads themselves into those sections of the state that were without the facilities of transportation. The extension of railroads was what was desired, and it is to be presumed that to secure these ends was the object for which the lands were granted. It is therefore a reasonable conclusion that it was intended, in computing the mileage for which the lands were to be granted, to take into the account the miles of linear extension only. Both the letter and spirit of the act clearly indicate to our minds that such is its only proper construction.

But it is insisted that, in determining this question, we should be governed by the construction of the statute acted upon by the executive department of the state government; and it is claimed that "during the administration of Governor Pease, and on down through all administrations, engineers appointed by the governors for that purpose examined and measured the roads as constructed from time to time, made their reports of number of miles of main and side track, which reports were examined and approved by the governors, and the commissioners of the general land office issued certificates and patents for land for both side and main track, and in two instances reports were made and approved for side track alone." But it must be borne in mind that prior to 1876 the certificates were issued and grants of land made to railroad companies by virtue of the act of January 30, 1854, Pasch. Dig. art. 4945 *et seq.* The first section of that act reads as follows: "Any railroad company char-

tered by the legislature of this state, heretofore or hereafter constructing, within the limits of Texas, a section of twenty-five miles or more of railroad, shall be entitled to receive from the state a grant of sixteen sections of land for every mile of road so constructed and put in running order." It must be conceded, we think, that this language, in so far as the question before us is concerned, is substantially the same as that contained in the granting clauses of the act under consideration. But the twelfth section of the act of 1854 contained the following language: "The provisions of this act shall not extend \* \* \* to any company for more than a single track road with the necessary turnouts." This provision is not contained in the act of August 16, 1876. Its meaning is not clear to our minds. Whether it was intended to be merely descriptive of the railroads which should be empowered to receive the grants, or whether it was intended to grant lands for the sidings, we are not called upon to decide. It must be conceded, however, that it admits of the latter construction, and affords a reason for the interpretation placed upon the act by the executive officers of the state, which without it would not be apparent to our minds. The construction of that act, therefore, does not aid us in construing the latter statute. The omission from the latter act of the language quoted does not tend to support the construction claimed by appellant. The failure to insert it, if entitled to any weight, tends rather to the opposite conclusion. It may have been omitted with a view to deny the right to receive lands for the turnouts. It is, however, true, as claimed, that reports for sidings were approved by Gov. Hubbard under the act of 1876, and that certificates therefor were issued by the commissioners; but it is also true that Gov. Roberts refused to approve the state inspector's reports in so far as they embraced the mileage of the side tracks. But conceding, for the sake of the argument, that the construction of the act of 1876 by the executive department has been uniformly favorable to the claim of the appellant, does it follow that we are to be guided upon this question by that construction? We recognized the rule that in cases of doubt the contemporaneous construction of any department of the government is entitled to great weight, and is sometimes given a controlling influence. That rule we have applied in construing another statute in the present case. But it seems to be well settled that, when the meaning of the language in a statute is clear, it has no application. *Suth. St. Const. § 307 et seq.* If the words contained in the act under consideration were of doubtful meaning, we could not lightly disregard the construction given them by the officers of the state who

were called upon to act upon them. But their import appears too clear to admit of any reasonable doubt. We are constrained, therefore, to follow our own convictions, regardless of the views manifested by the acts of the officers of the executive department, and to hold that the appellant was not entitled, under the act of 1876, to receive lands for its side tracks.

But did the facts that more certificates were issued to the appellant than it was entitled to receive, and that those issued for the sidings were not distinguishable from those issued for the lineal extension of the road, justify the court in holding all the certificates void, and rendering a judgment in favor of the state for a recovery of all the lands? There was no concealment, artifice, or fraudulent device of any character in procuring the certificates for the sidings. The mileage of the side tracks were reported as such by the state's inspector, and the report was approved by the governor. The certificates for the sidings were openly demanded, and were issued by the commissioner of the general land office without question, under what might reasonably have appeared to him the uniform ruling of his office. Even admitting that fraud would vitiate the entire issue of the certificates into which the computation for the sidings entered, (a doctrine we are not called upon to announce), that rule would not sustain this judgment. This is a case of an excessive grant, wholly untainted by fraud. The case of *Maxey v. O'Connor*, 23 Tex. 234, was similar in principle to this. It involved a question of excess in a grant of lands to Power & Hewitson under their colonization contract. In that case the court say: "If the grant was excessive, as contended, and the grantees actually received title, whether in one tract by one title of possession, or in different tracts by several titles, to more land than they had the right to demand for the number of families introduced by them, it is not perceived that the case is different in principle from any other excessive grant. The excess does not render the grant void *in toto*, but only voidable, at most, by the government." The same doctrine was recognized by the supreme court of the United States in *White v. Burnley*, 20 How. (U. S.) 247, and it is unquestionably the law. The rule is manifestly just, and the remedy of the state is to reform the grant and to recover the excess. It follows that there is error in the judgment for which it must be reversed.

What specific relief should be granted in each particular case we do not deem it proper to determine. There may be cases in which the rights of purchasers are involved, and the establishment in advance of any general rule might operate

All certificates not valid.

to influence a determination of these rights before they have had an opportunity of being heard. Where certificates have been issued for sidings alone, the simple remedy is to declare them void, and to give judgment for the recovery of the lands. When certificates for railroad proper and certificates for the side tracks are blended in one series, and all the lands are still claimed by the company, the remedy would seem to be to reform the grants in one proceeding, and to recover upon equitable principles the entire excess. When valid certificates only are issued, the company has the right to select for their location any of the unappropriated public domain of the state which is subject to location under the constitution and laws of the state. Therefore, in a proper case, it would seem not inequitable to permit the company to select the lands it should be adjudged to retain, and to give judgment for the state for what remains. It will operate no injustice to the state to permit that to be done upon the final adjudication of the controversy which the defendant had the right to do when it made its locations.

For the error pointed out the judgment is reversed, and the cause remanded.

**Forfeiture of Land Grants.**—See notes, 14 Am. & Eng. R. Cas. 504; 26 *Id.* 531; *Bybee v. Oregon & C. R. Co.* (U. S.) 46 *Id.* 460, and cases cited in note, 472.

**Forfeiture of Grant—Intersection of two Roads—Reversion to United States.**—By Act Cong. May 12, 1864, public lands were granted to the state of Iowa to aid in building a railroad from Sioux City to the Minnesota state line, and another from McGregor westward, to the total amount of the alternate odd numbered sections within the limit of 10 miles along each side of the railroad. In a proceeding between the two railroad companies it was held by the supreme court of the United States that where they intersected each other, and the limits overlapped, each company took under the grant half the designated lands. One of the companies failed to earn the lands in the overlapping limits by building its road. *Held*, that such lands reverted to the United States, and were added to the unappropriated public domain, and the other road takes no title thereto under the grant. *United States v. Sioux City & St. P. R. Co.* (C. C. N. D. Iowa), 46 Fed. Rep. 502.

**Construction of Grant—Reservation of Sections from Entry—Fixing Line of Road.**—In *Northern Pac. R. Co. v. Sanders*, 47 Fed. Rep. 604, the circuit court of the district of Montana reconsidered their former opinion in the same case, reported in 46 Am. & Eng. R. Cas. 431. It appeared that the act of congress granting land to the Northern Pacific Railroad Company to aid in the construction of its road granted every alternate section of public land, not mineral, designated by odd numbers, for a certain distance on each side of the line it might adopt, to which the United States had title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights "at the time the line of said road should be definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office," and directed that the president should cause the lands to be surveyed on both sides of the line of the road "after the general route should be fixed." Section 6 declared that the odd sections thereby granted should not be liable to "sale, or entry, or pre-emption" before

or after such survey, except by the company. The court held that the act did not reserve said sections from subsequent entry before the line of the road was definitely fixed by filing a map thereof with the commissioner of the general land office.

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UNITED STATES

v.

MISSOURI, KANSAS & TEXAS R. CO.

(141 U. S. 358.)

**Land Grant—Overlapping Grants—Place Limits—Supplying Deficiencies.**—The even numbered sections of land within the place limits of the grant to the Leavenworth, Lawrence & Fort Gibson R. Co. were reserved to the United States by the Act of congress of 1863, and, therefore, were excepted from the grant in the Act of 1866 to the Union Pacific R. Co., Southern Branch (now the Missouri, Kansas & Texas R. Co.), and could not be patented to such railway company to supply deficiencies in its place limits. But the even-numbered sections that were within the common indemnity limits of both roads could be used to supply deficiencies in the place limits of the Missouri, Kansas & Texas R. Co., saving the rights acquired under the pre-emption and homestead laws before the selection of such lands for purposes of indemnity.

**When Title to Indemnity Lands Vests.**—Title to indemnity lands does not vest in a railroad company, for the benefit of which they are contingently granted, until they are actually selected for indemnity purposes, and the selection approved by the Secretary of the Interior.

**Suit by United States to Set Aside Patents for Land.**—A suit may be maintained by the United States to vacate patents for land, improperly issued by reason of mistake or fraud, where the government has a direct interest or is under an obligation respecting the relief invoked, and especially where such a proceeding would accomplish the substantial ends of justice and avoid a multiplicity of suits.

**APPEAL** from the circuit court of the United States for the district of Kansas.

This is a suit in equity by the United States for the cancellation of certain patents for lands in Allen county, Kan., of date, respectively, November 3, 1873, March 19, 1875, August 17, 1876, and April 23, 1877, and alleged to have been issued to the Missouri, Kansas & Texas Railway Company without authority of law.

The institution of such a suit as this was recommended by the secretary of the interior in a communication addressed to the attorney general, under date of June 10, 1886. 4 Dec. Dep. Int. 573, 578; 5 Dec. Dep. Int. 280, 481. The present suit was not, however, brought until after the passage of the act of congress of March 3, 1887, requiring the immediate adjustment by the secretary of the interior, in accordance with the decisions of this court, of all unadjusted land grants



made by congress to aid in the construction of railroads. 24 St. p. 556, chap. 376. That act made it the duty of the attorney general to commence and prosecute suits for the cancellation of all patents, certification, or other evidence of title issued for public lands, and to restore the title to the United States in all cases of lands appearing, upon the completion of such adjustments or sooner, to have been "erroneously certified or patented by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad," if such company neglected or failed, upon demand by the secretary of the interior, to relinquish or reconvey to the United States all such lands, whether within granted or indemnity limits. Sections 1, 2. The act also provided that a *bona fide* settler whose homestead or pre-emption entry had been erroneously cancelled on account of any railroad grant, or the withdrawal of public lands from market, should, upon application, be reinstated in all his rights, and allowed to perfect his entry, by complying with the public land laws, provided he had not located another entry in lieu of the one so erroneously canceled, or voluntarily abandoned his original entry; and if a settler did not, within a reasonable time to be fixed by the secretary of the interior, make his application to be reinstated, all such unclaimed lands were required to be disposed of under the public land laws, with priority of right to *bona fide* purchasers, if any; then to *bona fide* settlers residing thereon. Section 3. In respect to lands, except those last mentioned, found to have been erroneously certified or patented, and to have been sold by the grantee company to citizens of the United States, or to persons who had declared their intention to become such, it was provided that "the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land-office, within such time and under such rules as may be prescribed by the secretary of the interior, after the grants, respectively, shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the secretary of the interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands;" the right of the purchaser of the lands so erroneously withdrawn, certified, or patented to recover the purchase money therefor from the grantee company, less the amount paid to the United States by such company, being saved; and no mortgage or pledge of the lands by the company to be considered as a sale for the purpose of the act. Section 4.

It was further provided that where a company had sold to citizens of the United States, or to persons who had declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for its use, such lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of the road, and where the lands so sold were excepted from the operation of the grant to the company, it should be lawful for the *bona fide* purchaser thereof from the company to make payment to the United States at the ordinary government price for like lands, and thereupon patents should issue therefor to him, his heirs or assigns. All lands were excepted from these provisions which at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation had not since been voluntarily abandoned; as to which excepted lands the said pre-emption and homestead claimants were permitted to perfect their proofs and entries and receive patents. These last provisions do not apply "to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases." Section 5.

Demurrers to the bill having been sustained, (37 Fed. Rep. 68,) and the suit dismissed, the United States prosecuted the present appeal.

*Asst. Atty. Gen. Maury and Wm. Lawrence*, for the United States.

*A. L. Williams, A. T. Britton, A. B. Browne, James Hagerman, and Simon Sterne*, for appellees.

HARLAN, J.—The lands in dispute are of two classes: (1) Even-numbered sections that are within the original 10-mile or place limits of the Leavenworth, Lawrence & Ft. Gibson Railroad Company, subsequently named the Leavenworth, Lawrence & Galveston Railroad Company, and to be hereafter, in this opinion, referred to as the Leavenworth Company. Those sections are also within the indemnity limits of the Missouri, Kansas & Texas Railroad Company, originally named the Union Pacific Railroad Company, Southern Branch, and to be hereafter referred to as the Missouri-Kansas Company. (2) Even-numbered sections within the common indemnity limits of both roads.

Lands in  
dispute.

No question is presented in this case as to the odd-numbered sections within either the place or the indemnity limits of the Leavenworth road.

In respect to each of the above classes of lands, the bill alleges that rights had attached under the homestead and pre-emption laws in favor of settlers,—some, before the passage of the act, to be presently referred to, under which the Missouri-Kansas Company claims; and others after that date, but before the selection of such lands, by the direction of the secretary of the interior, as indemnity lands for that company.

But the principal question raised by the demurrer is whether the Missouri-Kansas Company was entitled, under any circumstances whatever, to make up losses or deficiencies, occurring in its place limits, from even-numbered sections within either the place or the indemnity limits of the Leavenworth road.

Acts of 1863  
and 1866  
construed.

This question depends upon the construction of three acts of congress, passed, respectively, March 3, 1863, July 1, 1864, and July 26, 1866, granting lands to the state of Kansas to aid in the construction of these railroads.

The grant made by the act of March 3, 1863, was of every alternate section of land designated by odd numbers, for 10 sections in width on each side, in aid of the construction of the following roads, and each branch thereof: *First*, a railroad and telegraph from the city of Leavenworth, Kan., by the way of Lawrence and the Ohio City crossing of the Osage river, to the southern line of the state in the direction of Galveston bay, in Texas, with a branch from Lawrence, by the valley of the Wakarusa river, to the point on the Atchison, Topeka & Santa Fe Railroad where that road intersects the Neosho river; *second*, a railroad from the city of Atchison, Kan., via Topeka, to the western line of that state, in the direction of Fort Union and Santa Fe, N. M., with a branch where the latter road crosses the Neosho, down said Neosho valley, to the point where the road first named (the Leavenworth road) enters the Neosho valley. In respect to each road and branches, it was provided that "in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States, for any purpose whatever, then it shall be the duty of the secretary of the interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which

the rights of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers, and selected by direction of the secretary of the interior as aforesaid, shall be held by the state of Kansas for the use and purpose aforesaid: provided, that the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches; provided, further, that the lands hereby granted for and on account of said roads and branches, severally, shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided." 12 St. p. 772, chap. 98, § 1.

The second section of the act provided that "the sections and parts of sections of land which, by such grant, shall remain to the United States, within ten miles on each side of said road and branches, [that is, the even numbered sections within the place or granted limits,] shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price, as aforesaid: provided, that actual and *bona fide* settlers, under the provisions of the pre-emption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid: and provided, also, that settlers on any of said reserved sections, under the provisions of the homestead law, who improve, occupy, and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding." Section 2.

The state of Kansas, by an act approved February 29, 1864, accepted the above grant, upon the terms and conditions prescribed by congress; and gave the benefit of it, in respect to the railroad and telegraph first mentioned in the act of 1863, to the Leavenworth Company; and, in respect to the other railroad and telegraph, to the Atchison, Topeka & Santa Fe Railroad Company, formerly the Atchison & Topeka Railroad Company, to be hereafter referred to as the Atchison Company.

By the act of July 1, 1864, congress granted to Kansas, to aid in the construction of a railroad and telegraph line from Emporia, by the way of Council Grove, to a point near Ft. Riley, on the branch Union Pacific Railroad, in that

state, "every alternate section of land designated by odd numbers for ten sections in width on each side of said road," subject to the provisions, restrictions, limitations, and conditions prescribed in the above act of March 3, 1863; and also changed the branch railroad and telegraph line from Lawrence by the valley of the Wakarusa river to a point on the Atchison, Topeka & Santa Fe Railroad where that road intersects the Neosho river, so as to run from Lawrence to Emporia, and, thus changed, to have the grant of lands made by the act of 1863, 13 St. p. 339, chap. 198.

The above acts of congress of 1863 and 1864 were accepted; and thereafter, by writing of date March 19, 1866, the Atchison Company sold, assigned, and transferred to the Union Pacific Railroad Company, Southern Branch, a corporation of Kansas,—the Missouri Kansas Company,—all the rights, titles, interests, franchises, privileges, immunities, and liabilities held, acquired, possessed, and enjoyed for constructing, maintaining, operating, and enjoying a railroad, from a point at or near Ft. Riley down the Neosho valley to where the Leavenworth road might enter the Neosho valley; "which rights, titles, interests, franchises, authorities, immunities, and liabilities accrued to and became vested" in the assignor company "by virtue of its acceptance of the provisions of the act of the legislature of the state of Kansas;" the assignee company agreeing to perform all the duties, and to meet all the obligations and liabilities, assumed by the other company in respect to the said road. This assignment was ratified by a joint resolution of the legislature of Kansas passed February 26, 1867.

The act of July 26, 1866, provided, among other things, that, for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, (the Missouri Kansas Company,) a corporation organized under the laws of the state of Kansas, "to construct and operate a railroad from Ft. Riley, Kan., or near said military reservation, thence down the valley of the Neosho river to the southern line of the state of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Ft. Smith, Ark., there is hereby granted to the state of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that

the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the secretary of the interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid; which lands, thus indicated by the direction of the secretary of the interior, shall be reserved and held for the state of Kansas for the use of said company by the said secretary for the purpose of the construction and operation of said railroad, as provided by this act: provided, that any and all lands heretofore reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operations of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the president of the United States: and provided, further, that said lands hereby granted shall not be selected beyond twenty miles from the line of said road." 14 St. p. 289, chap. 270.

The contention of the government is that the lands in dispute—the even numbered sections within both the place limits and the indemnity limits of the Leavenworth road—had been "reserved to the United States" by the act of 1863, and therefore were excluded from the operation of the act of 1866; consequently they could not be taken for or patented to the Missouri Kansas Company. If the premise of this contention be true, the conclusion just stated would necessarily follow; because, although by the first section of the act of 1866 that company was entitled to indemnity from "the public lands of the United States nearest to the sections" within its granted or place limits, and within 20 miles of its line, for all granted sections or parts of granted sections which, at the time of the definite location of its road, appeared to have been sold by the United States, or to which the right of pre-emption or homestead settlement had attached, or which had been reserved to the United States for any purpose whatever, the first proviso of the same section reserved and excepted from the operation of the act all lands reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose

Lands reserved to the United States.

of aiding in any object of internal improvement, or any other purpose whatever. Of course, lands so reserved and excepted from the operation of the act could not be selected as indemnity lands for the road in aid of the construction of which the grant of 1866 was made. The important inquiry, therefore, is whether, within the meaning of the act of 1866, the lands in dispute, or any of them, were reserved to the United States by the act of 1863.

A reservation clause, such as the one in the act of 1866, first appeared in the act of congress of September 20, 1850, granting lands to the state of Illinois in aid of the construction of what is now the Illinois Central Railroad. 4 Dec. Dep. Int. 575. Congress, by an act passed March 2, 1827, had made a similar grant in aid of the construction of the Illinois & Michigan Canal, with a reservation of each alternate section to the United States. In order that the canal might have the full benefit of the lands covered by the grant of 1827, the following clause was inserted in the act of 1850: "And provided, further, that any and all lands reserved to the United States by the act entitled 'An act to grant a quantity of land to the state of Illinois for the purpose of aiding in opening a canal to connect the waters of the Illinois river with those of Lake Michigan,' approved March 2, 1827, be, and the same are hereby, reserved to the United States from the operations of this act." 9 St. p. 466, chap. 61; 21 Cong. Globe, p. 900. The policy indicated by this reservation was pursued in all subsequent acts granting lands to aid in the construction of railroads; the only difference between the reservation clause in the act of 1850, and those inserted in subsequent acts, being that the former was special in its application to a particular previous grant, while each one of the latter class was general in its application to prior grants of every kind. The manifest object of the general proviso was to exclude from the particular grant all lands previously reserved to the United States for any specific object whatever, and thereby enable the government to accomplish those objects without confusion or conflict in the administration of the public domain, and thus keep faith with those to or for whose benefit prior grants were made. *Dubuque & P. R. Co. v. Litchfield*, 23 How. (U. S.) 66; *Wolcott v. Des Moines Co.*, 5 Wall. (U. S.) 681, 687; *Homestead Co. v. Valley R. Co.*, 17 Wall. (U. S.) 153; *Wolsey v. Chapman*, 101 U. S. 755; *Litchfield v. County of Webster*, *Id.* 773; *Dubuque & S. C. R. Co. v. Des Moines Val. R. Co.*, 109 U. S. 329, 14 Am. & Eng. R. Cas. 532; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *Bullard v. Des Moines & Ft. D. R. Co.*, 122 U. S. 167, 176; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 40 Am. & Eng. R. Cas. 426.

Having regard to the words and the conceded object of the reservation clause, we are of opinion that the position of the government, in respect to the even-numbered sections, within the 10-mile or place limits of the Leavenworth road, is well taken. The grant, in the act of 1863, was of every alternate section of land designated by odd numbers, for 10 sections in width on each side of the road, with the right, in case of loss of lands within the place limits, from any of the specified causes, to select indemnity lands (not generally, from the public lands of the United States, but) from "the public lands of the United States nearest to tiers of sections above specified;" that is, nearest to the tiers of sections in place limits, and within 20 miles of the road,—the lands thus selected for indemnity to be odd-numbered sections. It is too obvious to require argument to show that, as losses to the Leavenworth road in its place limits were required to be made up from odd-numbered sections inside of the exterior line of its indemnity limits, the even-numbered sections in its place limits could not be used to supply such deficiencies. Such even-numbered sections in the place limits were, therefore, referred to in the second section of the act of 1863, as "reserved sections" that "remain to the United States."

The defendants insist, however, that they were not "reserved to the United States," within the meaning of the act of 1866. It is true they were not reserved to aid in the construction of the Leavenworth road, or for any specified object of internal improvement. But the act of 1866 does not restrict the objects of the reservation to works of internal improvement. If the reservation in question was by congress, or other competent authority, for any purpose whatever, then the lands so reserved were excluded from the operation of the act of 1866. Now, it is clear that the even-numbered sections, within the place limits of the Leavenworth road, were reserved, by the act of 1863, for purposes distinctly declared by congress, and which might be wholly defeated if the Missouri-Kansas Company were permitted to take them as indemnity lands under the act of 1866. The requirement in the second section of the act of 1863, that the "reserved sections" which "remain to the United States," within 10 miles on each side of the Leavenworth road, "shall not be sold for less than double the minimum price of the public lands when sold," nor be subject to sale at private entry until they had been offered at public sale to the highest bidder, at or above the increased minimum price; the privilege given to actual *bona fide* settlers, under the pre-emption and homestead laws, to purchase those lands at the increased minimum price, after due proof of settlement, improvement, cultivation, and occu-



pancy, and the right accorded to settlers on such sections under the homestead laws, improving, occupying, and cultivating the same, to have patents for not exceeding 80 acres each, are inconsistent with the theory that the even-numbered sections, so remaining to the United States, within the place limits of the Leavenworth road, could be taken as indemnity lands for a railroad corporation.

As the natural result of the construction of the road aided would be an increase in the market value of the reserved sections remaining to the United States, within the place limits of the Leavenworth road, those sections were not left to be disposed of under the general laws relating to the public domain. But, in order that the government might get the benefit of such increased value, and thereby reimburse itself to some extent for the lands granted,—the title to which vested in the state or the company upon the definite location of the line of the road, and, by relation as of the date of the grant,—the act of 1863 made special provisions in reference to those reserved sections, and thereby, and for the accomplishment of particular purposes, expressly declared, segregated them from the body of the public lands of the United States. Being thus devoted to specified objects, they were reserved to the United States, and could not be selected by the state, either under the act of 1863 or under that of 1866, for other and different objects. They could not be selected as indemnity lands under the act of 1863, because the lands to be selected under that act were restricted to odd-numbered sections; nor under the act of 1866, because, at the date of its passage, they were reserved for the special purposes indicated in the second section of the act of 1863.

It follows that the Missouri, Kansas & Texas Railroad Company was not entitled, in virtue of the act of 1866, to have indemnity lands from the even-numbered sections within the place limits of the Leavenworth road. The issuing of patents to it for such lands was unauthorized by law.

But we are of opinion that, in respect to the even-numbered sections within the indemnity limits of the Leavenworth road,—that is, outside of 10 and within 20 miles of its line,—the case stands upon wholly different grounds. We cannot assent to the suggestion that they also were reserved by the act of 1863, and excluded from the operation of the act of 1866. The utmost that could be claimed, in respect to lands within the indemnity limits of the Leavenworth road, is that the odd-numbered sections in those limits, being designated by the act of 1863, as the source from which to supply losses in the place limits of that road, were excluded from the operation of the act of 1866. Whether such a claim could be sustained or not we need not now inquire; but that contention, if sound, does

not meet the exigencies of the present case. We are dealing here with the even-numbered sections in the indemnity limits of the Leavenworth road, which were not devoted by the act of 1863 to any specified purpose, but were left under the general laws regulating the disposal of the public lands. No provision was made, as in the case of the even-numbered or reserved sections within the place limits, for their sale at not less than double the minimum price of the public lands when sold, nor were any restrictions placed upon their sale or disposition different from those applicable to the public lands generally. Settlers under the pre-emption and homestead laws were accorded by the act of 1863 no more rights and privileges in respect to the even-numbered sections within the indemnity limits of the Leavenworth road than they had in other public lands of the United States wherever situated. They were reserved to the United States only in the sense that all the public lands of the United States, not set apart for some declared object, are reserved to be disposed of under the general laws relating to the public domain. But a reservation of that general character is not what was meant by the act of 1866. That act excluded from its operation only such lands as had been reserved by congress or other competent authority for some distinct, defined purpose.

This conclusion finds support in the peculiar language of the act of 1866 allowing selections by the Missouri-Kansas Company of indemnity lands, within 20 miles of its road, to be made from "the public lands of the United States nearest to the sections above specified," that is, nearest to the odd-numbered sections within the place limits. Many acts of congress, making grants of public lands in aid of the construction of railroads, have restricted the selection of indemnity lands simply to alternate sections or parts of sections nearest or most contiguous to the tier of sections in the place limits; thus apparently leaving it to the secretary of the interior—subject, it may be, to the requirement as to alternation—to approve, as he might think best, the selection of odd-numbered or even-numbered sections within the prescribed indemnity limits.<sup>1</sup> In many other acts the selection of indemnity lands was restricted to the odd-numbered sections, as was the case in the above act of 1863.<sup>2</sup> The two classes

<sup>1</sup> Illinois, 1850, 9 St. 466; Missouri, 1852, 10 St. 8; Arkansas and Missouri, 1853, 10 St. 155; Iowa, 1856, 11 St. 9; Florida, 1856, 11 St. 15; Alabama, 1856, 11 St. 17; Louisiana, 1856, 11 St. 18; Michigan, 1856, 11 St. 21; Wisconsin, 1856, 11 St. 20; Mississippi, 1856, 11 St. 30; Minnesota and Alabama, 1857, 11 St. 195; Minnesota, 1864, 13 St. 64; Wisconsin, 1864, 13 St. 66.

<sup>2</sup> Kansas, 1863, 12 St. 772; Iowa, 1864, 13 St. 72; Northern Pacific R. Co., 1864, 13 St. 365; Minnesota, 1866, 14 St. 87; Kansas, 1866, 14 St. 210; California and Oregon R. Co., 1866, 14 St. 239; Atlantic & Pacific and Southern Pacific Railroads, 1866, 14 St. 292; Oregon Central R. Co., 1870, 16 St. 94; Texas Pacific R. Co., 1871, 16 St. 576.

of acts are to be found in the legislation of congress at the session the act of July 26, 1866, for the benefit of the Missouri-Kansas Company, was passed. The grants to Missouri and Minnesota of July 4, 1866; to Kansas of July 23, 1866; to the California & Oregon Railroad Company of July 25, 1866; and to the Atlantic & Pacific Railroad Company of July 27, 1866,—all, in terms, provided for the selection of odd-numbered sections for purposes of indemnity; while the grant to Kansas of July 25, 1866, to aid in the construction of the Kansas & Neosho Valley Railroad Company, and the grant of July 26, 1866, to the same state, for the benefit of the Missouri-Kansas Company, contained no such restriction, and only required that indemnity lands be selected from the public lands of the United States nearest to the tier of granted sections within the place limits of the respective roads. 14 St. p. 83, chap. 165; *Id.* p. 87, chap. 168; *Id.* p. 210, chap. 212; *Id.* p. 239, chap. 242; *Id.* pp. 293, 295, chap. 278; *Id.* p. 236, chap. 241; *Id.* p. 289, chap. 270. This difference in land-grant acts was not unusual, as will be seen from the various statutes cited in the margin. We do not feel at liberty to hold that this difference was unintentional upon the part of congress. It is too well defined in its legislation to justify any such interpretation. The words in the act of July 26, 1866, for the benefit of the Missouri-Kansas Company, indicating the source from which indemnity lands were to be obtained, namely, "from the public lands of the United States nearest to sections above specified," cannot well be held to mean the same thing as the words, in other acts, "from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers." In one case the selection, for purposes of indemnity, may be from any of the public lands of the United States nearest to the tier of sections in the place limits; in the other, the selection is restricted to odd-numbered sections within the indemnity limits; in either case, however, could lands be selected that had been previously withdrawn by competent authority from location, sale or entry, or had been appropriated or sold by the United States, or to which pre-emption or homestead rights had attached.

In our judgment,—omitting for the present any consideration of the rights alleged to have been acquired by individuals under the homestead and pre-emption laws in the lands in dispute, and looking at the case only as between the United States and the Missouri-Kansas Company,—there is no escape from the conclusion that the even-numbered sections within the indemnity limits of the Leavenworth road,

not being set apart by the act of 1863 for any specific purpose and being also nearest to the granted sections within the place limits of the Missouri-Kansas Company, were not, by that act, reserved to the United States, within the meaning of the act of 1866, and therefore—if no rights had attached to them before their selection with the approval of the secretary of the interior—could have been legally selected as indemnity lands for that company.

We say, prior to such selection and approval, because as to lands which may legally be taken for purposes of indemnity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the secretary of the interior, specifically for indemnity purposes. It was so held in *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 421, 26 Am. & Eng. R. Cas. 506, in which the court, referring to the above act of 1863, said in reference to the lands in the indemnity limits: "Until selection was made, the title remained in the government, subject to its disposal at its pleasure. \* \* \*

When title to  
indemnity  
land vests.

The grant to Kansas, as stated, conferred only a right to select lands beyond ten miles from the defendant's road, upon certain contingencies. It gave no title to indemnity lands in advance of their selection." The same principle was announced in *Barney v. Winona & St. P. R. Co.*, 117 U. S. 228, 232, 26 Am. & Eng. R. Cas. 522, where the court said: "In the construction of land grant acts in aid of railroads, there is a well established distinction observed between 'granted limits' and 'indemnity lands.' The former are those falling within the limits especially designated, and the title to which attaches, when the lands are located, by an approved or accepted survey of the line of the road filed in the land department as of the date of the act of congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection." So in *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.*, 117 U. S. 406, 408, 24 Am. & Eng. R. Cas. 100. "No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the secretary of the interior." But the fullest and most recent expression of opinion upon this question by this court is in *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496, 511, 41 Am. & Eng. R. Cas. 669, where it was said: "He (the secretary) was required

to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. \* \* \* Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts." To the same effect were the previous cases of *Grinnell v. Chicago, R. I. & P. R. Co.*, 103 U. S. 739; 5 Am. & Eng. R. Cas. 547, St. P. & S. C. R. Co. *v.* *Winona & St. P. R. Co.*, 112 U. S. 720, 731; *Cedar Rapids & M. R. R. Co. v. Herring*, 110 U. S. 27, 14 Am. & Eng. R. Cas. 537. As to the exception to this rule noticed in *St. Paul & Pac. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 19, it is sufficient to say that it has no application to the facts of this case. In respect, therefore, of even-numbered sections within the indemnity limits of the Leavenworth road, pre-emption and homestead rights may have legally attached before their final selection as indemnity lands for the Missouri-Kansas Company. And rights thus attaching would not be displaced by subsequent selection, and by issuing patents to the railroad company.

For the reasons stated, we adjudge that the selection of even-numbered sections within the indemnity limits of the Leavenworth road, to which rights of homestead and pre-emption laws had not attached, to indemnify the Missouri-Kansas Company for losses in its place limits, and the issuing to it of patents therefor, were not without authority of law.

We have indicated, however, that the question as to the right of the Missouri-Kansas Company, for purposes of indemnity, to select even-numbered sections within the indemnity limits of the Leavenworth road, may, according to the averments of the bill—which the demurrer admits to be true—

have some connection with the rights acquired by individuals under the homestead and pre-emption laws. These averments are: That prior to July 26, 1866, and prior to the selection of indemnity lands for the Missouri-Kansas Company by the secretary of the interior,—which selections it is alleged were partially made on each of the respective days of August 20, 1872, July 29, 1874, and May 10, July 12, and December 26, 1876,—a large number of actual and *bona fide* settlers over the age of 21 years, and citizens of the United States, each thus and otherwise having all the qualifications required by the homestead and pre-emption laws of the United States to obtain patents from the United States, each for a half-quarter section of said lands within ten miles of the located line of the Leavenworth road, and each for one quarter section of said lands outside of said ten mile limits, but within twenty miles of said line of road, claimed the right under those laws to take the necessary proceedings and do the acts requisite to obtain title, respectively, to such tracts of land, including most of the lands in the patents mentioned; that for this purpose sundry of such persons, prior to July 26, 1866, and prior to such selections, entered upon, occupied, and improved, as required by said laws, a half-quarter section of land, within said ten mile limits, and others each entered upon, occupied, and improved, as required by the same laws, some each one-half-quarter section of land, and others each a quarter section of such lands; that sundry of such persons did each do all the acts required by and in all respects complied with, the homestead and pre-emption laws in due time to be entitled to occupy said tracts of half-quarter and quarter sections, respectively, and to receive patents therefor from the United States; that said persons have ever since been, and still are, each entitled to receive a patent conveying to them, respectively, said tracts of land so by each occupied and improved, including most of the lands in said patents mentioned; that said persons have, respectively, ever since so entering upon said lands, continued to occupy and hold them, and are ready and willing and offer to do whatever may be required to procure a patent from the United States; and that the defendants, and those under whom they claim title, always well knew these facts, and none of them ever took or had possession of any of said lands, but all of them have been in the occupancy and possession of other persons as aforesaid, claiming the right to obtain title thereto from the United States.

Action by  
United States  
to set aside  
patents.

The bill, after stating that the government was unable, at

the commencement of the suit, to specify what portions and tracts of land have been settled upon and occupied by actual *bona fide* settlers, as aforesaid, for which patents should be issued, and asking permission to make proof thereof, proceeds to allege that the Missouri-Kansas Company, on the—— day of March, 1867, filed its map of definite location in the department of the interior; that the commissioner of the general land-office, by letter under date of March 19, 1867, directed the receiver and register of the local land-office at Humboldt, Kan., where the above-mentioned lands were subject to be taken under the homestead and pre-emption laws, to reserve from sale, location, or entry of any kind, all the land outside of a line 10 miles from the line of location of the said Missouri-Kansas Company; and on and after April 3, 1867, the date of the receipt of the above order at the local office, said lands were by them thereafter unlawfully reserved from sale, location, or entry; that the lands so withdrawn from sale, location, and entry include numerous tracts described in the patents in question; and that on and after April 3, 1867, said register and receiver each unlawfully proclaimed and made known their refusal to permit any citizen or settler to do any act to procure any title to any of such lands under any law, and they each refused to do or permit to be done by any citizen or settler any act requiring their official action or sanction to procure a right or title to them.

Notwithstanding this—the bill further alleges—a large number of citizens of the United States, each over the age of 21 years, and otherwise having all the qualifications required by said homestead and pre-emption laws, both prior to and on and after April 3, 1867, and prior to any selection of such lands by or in favor of the railroad company, each went upon, occupied, and improved half-quarter and quarter sections of land, as aforesaid, and some of them each complied with the homestead and pre-emption laws, and did every act necessary to procure patents for the lands so occupied by them, respectively, except only that the receiver and register would not permit any act to be done with or by them officially for the purpose of procuring title; that said persons, who have made large and valuable improvements upon the lands so occupied by them, have continued ever since to occupy and claim them, and a right to perfect their respective titles, and have always been and are ready and willing to do all acts required to entitle them to patents; and that the Missouri-Kansas Company has sold or agreed to sell to various persons, named as defendants herein, the lands so described, which are claimed by such defendants in fee or under such agreement, or under mortgages, but with notice of the rights

of the United States and of said claimants, under the homestead and pre-emption laws.

If the facts are as thus alleged, it is clear that the Missouri-Kansas Company holds patents to land both within the place and indemnity limits of the Leavenworth road which equitably belong to *bona fide* settlers who acquired rights under the homestead and pre-emption laws, which were not lost by reason of the land department having, by mistake or an erroneous interpretation of the statutes in question, caused patents to be issued to the company. The case made by the above admitted averments of the bill is one of sheer spoliation upon the part of the company of the rights of settlers, at least of those whose rights attached prior to the withdrawal of 1867; whether of others, it is not necessary at this time, to determine. It is true that the bill is not as full as it might have been in respect to the persons who are alleged to have acquired superior rights under the homestead and pre-emption law, or as to the particular tracts of land they claimed or occupied, or as to the dates when such homestead and pre-emption rights respectively accrued; and, if application had been made for a bill of particulars, it should have been granted. But there is no specific objection to the bill upon that ground. The defendants rested the case upon a general demurrer for want of equity, and it must be determined, in its present shape, upon the theory that the facts are as alleged in the bill. The argument on this branch of the case, by counsel for the railroad company, proceeds, in part, upon the assumption that there was no such compliance with the homestead and pre-emption laws as would give any of the settlers referred to in the bill the rights claimed for them in this suit. Indeed, one of the counsel insists that such settlers have no existence except in the bill filed by the government. And many other suggestions are made that depend upon matters of which we cannot, upon this record, take cognizance. We must take the case to be that which is presented by the bill, and give judgment accordingly. The defendants, by their demurrers, admit that the settlers, referred to in the bill, did all that the laws of the United States required in order to give them the rights which, the bill alleges, belong to them, and in disregard of which the patents in question were issued. If the railroad company chose to invite a decision upon such a case, it must abide the consequences.

That the case, as now presented, is one of equitable cognizance, we do not doubt. This question must be determined with reference to the equity jurisdiction of the courts of the United States, and not by reference to the remedies given



by the local law. As to some of the lands, so far as we can judge by the averments of the bill, the United States has a direct interest in them. As to others, it is under an obligation to claimants under the homestead and pre-emption laws to undo the wrong alleged to have been done by its officers, in violation of law, by removing the cloud cast upon its title by the patents in question, and thereby enable it to properly administer these lands, and to give clear title to those whose rights, under those laws, may be superior to those of the railway company. A suit, therefore, to obtain a decree annulling the patents in question, so far as it is proper to do so, was required by the duty the government owed as well to the public as to the individuals who acquired rights, which the patents, if allowed to stand, may defeat or embarrass.

In *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 286, which was a suit by the United States to set aside a patent alleged to have been improperly issued, and in which the right of the attorney general to bring such a suit was denied, this court held that such an action could be maintained where it appeared that there was an obligation on the part of the United States to the public, or to any individual, or where it had any interest of its own. In the recent case of *U. S. v. Beebe*, 127 U. S. 338, 342, it was said: "And it may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake, or obtained by fraud, where the government has a direct interest, or is under an obligation respecting the relief invoked. Even if it had not been thus authoritatively settled, it would have been difficult, upon principle, to reach any other conclusion. The public domain is held by the government as part of its trust. The government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and, under certain circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust. If a patent is wrongfully issued to one individual which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested. But if it should come to the knowledge of the government that a patent has been fraudulently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the government from fulfilling an obligation incurred by it, either to the public or to an individual, which

personal litigation could not remedy, there would be an occasion which would make it the duty of the government to institute judicial proceedings to vacate such patent. In the case before us, the bill avers that the patents, whose cancellation is asked for, were obtained by fraud and imposition on the part of the patentee, Beebe. It asserts that there exists, on the part of the United States, an obligation to issue patents to the rightful owners of the lands described in the bill; that they cannot perform their obligation until these fraudulent patents are annulled, and that they therefore bring this suit to annul these fraudulent instruments, whose existence renders the United States incapable of fulfilling their said prior obligation." These principles equally apply where patents have been issued by mistake, and they are especially applicable where, as in the present case, a multiplicity of suits, each one depending upon the same facts and upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice.

Much was said at the bar as to the bearing upon the present case of the decision in *Kansas City, L. & S. K. R. Co. v. Attorney General*, 118 U. S. 682, 29 Am. & Eng. R. Cas. 467. That was a suit by the United States to cancel certain patents issued to the Missouri-Kansas Company for lands selected, under the direction of the secretary of the interior, to indemnify that company for losses by reason of previous appropriations or sales of lands in place limits. It appears from the record of that case that the lands, so selected and patented, were odd-numbered sections within the overlapping indemnity limits of the grants made by the above acts of 1863 and 1866. As the Atchison and Leavenworth Companies were equally entitled, under the act of 1863, to obtain indemnity from the odd-numbered sections, within their respective overlapping indemnity limits; as the Atchison Company assigned its rights, under the acts of 1863 and 1864, to the Missouri-Kansas Company; and as it was shown that the Leavenworth Company had relinquished its right, title, and interest in the lands involved in that suit to the Missouri-Kansas Company,—nothing, it would seem, stood in the way of the selection of the above odd-numbered sections as indemnity lands for the latter company; provided the assignment by the Atchison Company to the Missouri-Kansas Company was valid for the purposes for which it was made; and provided, also, the acts of 1863, 1864, and 1866 were to be construed as *in pari materia*, and having a single object, namely, the building of one road down the Neosho valley to the point of intersection with the Leavenworth road. The court held

that the acts were to be so construed, and that the assignment by the Atchison Company, being approved by the state of Kansas and by congress in the passage of the act of 1866, was valid. The right of the Missouri-Kansas Company to indemnity from the odd-numbered sections within the overlapping indemnity limits of that company and of the Leavenworth Company was therefore upheld. There is nothing in that decision to sustain the proposition that the Missouri-Kansas Company could obtain indemnity from the even-numbered sections within the place limits of the Leavenworth road, which, as we have seen, were reserved to the United States by the act of 1863 for specific purposes, and therefore were excluded from the operation of the act of 1866. Nor does that case determine the question as to the right of the Missouri-Kansas Company to indemnity from the even-numbered sections within the common indemnity limits of that and the Leavenworth road to which claims of settlers had not attached before their actual selection by proper authority for that company. That right is sustained upon the grounds heretofore stated in this opinion, which are entirely apart from those upon which is based the decision in the other case in reference to the odd-numbered sections there in dispute.

Only one other matter, referred to in the bill, is of sufficient consequence to require notice. The demurrers were general for the want of equity; and, as what we have said leads to a reversal of the decree, it is unnecessary to express an opinion as to that part of the bill alleging that the Missouri-Kansas Company had, before the bringing of this suit, December 5, 1887, received patents for 252,929.14 acres, more or less, in excess of what it was or is entitled to receive. We adopt this course because the paragraph of the bill relating to this alleged excess is not sufficiently full and explicit to justify a consideration, at this time, of the question it attempts to raise. Besides, the act of March 3, 1887, required an immediate adjustment by the secretary of the interior of all unadjusted land grants made in aid of the construction of railroads. 24 St. p. 556, chap. 376. We are informed by the brief of one of the defendant's counsel that there has been a final adjustment of the grants made for the benefit of the Missouri-Kansas Company, and that such adjustment shows that there is a very large deficiency in lands due to that company. Whether the lands already patented to the railroad company are in excess of what it was entitled to receive, and what effect such a fact, if established, will have upon the present suit, are questions which can be better determined after the issues between the parties are fully made up and the evidence all taken.

The decree is reversed, and the cause remanded, with di-

rections to overrule the several demurrers to the bill, and to require answers from the defendants, and for other proceedings not inconsistent with this opinion.

**Intersecting and Overlapping Land Grants.**—See *United States v. Southern Pac. R. Co.* (C. C.) 46 Am. & Eng. R. Cas. 395; note 46 *Id.* 430; note 24 *Id.* 164; note 12 *Id.* 286.

**Right to Cut Timber from Public Lands.**—Act Cong. § 2, (13 St. U. S. 365), granting to the Northern Pacific Railroad Company "the right, power, and authority \* \* \* to take from the public lands adjacent to the line of said road, material of earth, stone, timber, etc., for construction thereof," was not intended to apply only to public lands contiguous to or adjoining the line of the road, but may extend to other lands. Timber taken from lands adjacent to the line of the railroad may be used for construction upon any part of it. *United States v. Lynde* (C. C. D. Mont.) 47 Fed. Rep. 297.

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### ST. PAUL & SIOUX CITY R. CO.

v.

WARD *et al.*

(*Minnesota Supreme Court, July 28, 1891.*)

**Land Grant—Fixing Line of Route—Filing Map—Pre-emption Rights.**—Under the congressional land-grant act of March 3, 1857, the line or route of the plaintiff's railway could only become definitely fixed, so as to prevent pre-emption and homestead rights from attaching to particular tracts, by filing the map of such line or route with the secretary of the interior.

**Same—Right to Make Selection—Indemnity Lands.**—As respects indemnity lands, the right to make selections did not accrue to the railway company till that date.

**Same—Homestead Rights.**—And where a valid homestead right has so attached, and the occupant has in all things complied with the provisions of the homestead law, he will be deemed to have acquired vested rights in the tract so occupied, which the courts will recognize and protect upon the final refusal of the land department to allow him to enter the land. Upon making his final proof in due form, his right to the land becomes complete, and the naked legal title held by the United States or its assignee is insufficient to warrant a judgment in ejectment against him.

**Effect of Withdrawing Lands Within Indemnity Limits.**—An order of the land department, withdrawing the odd-numbered sections within the indemnity limits, is inoperative as respects lands then occupied and claimed by a qualified pre-emptor. Such lands are not affected by the withdrawal, so that, if subsequently abandoned, they will, until a selection made by the railway company, be deemed still open for homestead settlement.

**The Construction Placed by the Department upon its Orders of Withdrawal** are entitled to great respect, and, unless clearly unreasonable, or violative of some legal principle, should be adopted and followed by the courts. Following *Hastings & D. R. Co. v. Whitney*, 34 Minn. 542, 24 Am. & Eng. R. Cas. 106.

APPEAL from Blue Earth District Court,  
W. H. Norris, for appellant.  
E. P. Freeman, for respondents.

VANDEBURGH, J.—This action concerns the title to a quarter section of land lying within the indemnity limits of the plaintiff's land grant. The general land grant Case stated. act of March 3, 1857, among other things, granted to the territory of Minnesota, "for the purpose of aiding in the construction of railroads, among others, from St. Paul and St. Anthony, via Minneapolis, to a convenient point of junction west of the Mississippi, to the southern boundary of the territory, in the direction of the mouth of the Big Sioux river, every alternate section of land designated by odd numbers for six sections in width on each side of said road; but in case it should appear that the United States have, when the line or route of said road was definitely fixed, sold any sections, or any part thereof, granted as aforesaid, so that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said territory or future state, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands, thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid, shall be held by the territory or future state of Minnesota for the use and purpose aforesaid; provided, that the land to be so located shall in no case be further than fifteen miles from the line of said road." And thereafter, by an act approved May 27, 1857, the legislature conferred the rights and privileges granted as aforesaid upon the Minnesota Southern Railroad Company, of which the plaintiff is the lawful successor. The question to be determined here is whether the plaintiff is entitled to the premises in question, as a part of its indemnity lands by virtue of its land grant, as against the title of a homestead claimant and settler, who was the grantor of the plaintiff. The evidence is not before us, and the case is to be determined upon the findings of the trial court. From these it appears that "on the 18th day of June, 1857, the railroad of the plaintiff was duly and definitely located opposite and by the land in question, and a map of such location was duly filed in the office of the commissioner of the general land-office on the 10th day of August, 1865, and the same was duly accepted by such commissioner as the final and definite location of said railroad." To supply deficiencies in place

lands, and as provided by the land grant act, indemnity lands were selected by the proper authority, including the land in question, in August, 1871, and the selections were thereafter duly approved in March, 1872, and certified by the secretary of the interior to the state of Minnesota, "subject to any intervening rights which might exist to any of the tracts in the list as having inured to said grant by virtue of said selection for the benefit of plaintiff's railroad company, and were in form conveyed by the state to the plaintiff on the 7th day of December, 1872." It is also found that the land in controversy was at all times public land of the United States to and including July 6, 1857, when one Rumrill filed in the local United States land office a declaratory pre-emption statement, alleging settlement thereon on the 18th day of June, 1857. This was followed by suitable improvements and residence thereon with his family, so that he was thereafter duly entitled to enter the same as a pre-emption claimant, unless the rights of the plaintiff were prior and superior to his. He continued his improvements and residence till in the month of March, 1863, having cultivated and improved 40 acres, and erected a dwelling-house and sheds and stables thereon. At that time he sold out his improvements to one George W. Johnson, and moved away, and the latter immediately moved into the house, and settled upon the land with his family, and on the 18th day of March, 1863, duly entered the land as a homestead at the same land-office, and received the proper homestead application receipt. He was a citizen of the United States, and entitled to make such application. He thereafter continued to occupy the land as his homestead, and to improve the same, till October, 1864, when he entered the military service of the United States, in which he continued till the 9th of March, 1865, when he died. His widow, Drucilla Johnson, continued to reside on and improve the premises during his absence, and subsequent thereto, down to March 9, 1869, when she made her final proof as widow, in all respects sufficient and satisfactory, and on that day received a final duplicate receipt therefor, in due form, which was recorded March 31, 1869, in the office of the register of deeds of the proper county; and she subsequently, for a valuable consideration, conveyed the land to these defendants, who continue to occupy and improve the same. It also appears that the entry of George W. Johnson was cancelled, by order of the commissioner of the general land-office, March 22, 1866. Of this she had no notice, but made her final proof thereunder in 1869, as before stated, which was accepted by the local land-office. Her final entry was also cancelled by the commissioner, June 28, 1870. The home-

stead entry of George W. Johnson was reinstated by the commissioner of the general land-office in March, 1883, and a patent ordered to issue to Mrs. Johnson on her final proof. This order was in turn reversed by the secretary of the interior, on the ground that the land had been certified to the state, and the jurisdiction of the land department had ceased. No question was made in any of the rulings of the land department as to the sufficiency of the improvements, qualifications of the settlers or the regularity of the proceedings, but the objections were based solely upon the supposed prior right of the plaintiff to claim this land as a part of its indemnity lands under its grant.

As we interpret the findings of the court, the line or route of the road was definitely located by the proper survey in June, 1857, but the map of such location was not filed and accepted, as finally adopted, until August 10, 1865. This last is the date upon which the land grant acquired precision, and "when the line or route of the road became definitely fixed," within the intent and meaning of the act of congress first referred to. *Weeks v. Bridgman*, 41 Minn. 352. This is the settled rule, as repeatedly declared by the supreme court of the United States in construing similar language in land-grant acts. *Van Wyck v. Knevals*, 106 U. S. 360, 10 Am. & Eng. R. Cas. 664; *Walden v. Knevals*, 114 U. S. 374; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 635; *Cedar Rapids & M. R.R. Co. v. Herring*, 110 U. S. 38, 14 Am. & Eng. R. Cas. 537. In *Van Wyck v. Knevals* it is said: "Until the map is filed the company is at liberty to adopt such route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company, and a map designating it is filed with the secretary, and accepted, the route is established and definitely fixed." And in *Kansas Pac. R. Co. v. Dunmeyer*, page 635, 113 U. S., Justice MILLER "concedes that the filing of the map is the act by which the line of the road is definitely fixed."

Until that was done there could be no basis for ascertaining the deficiency in the place land, or for any selections to supply it; and the right to make selections, did not accrue till that time, since the lines of the indemnity belt could not be definitely fixed and known except by that act; and not till actual selection could the company acquire any right or title to any of the lieu lands. *Musser v. McRae*, 38 Minn. 409, and 44 Minn. 344; *Ryan v. Central Pac. R. Co.*, 99 U. S. 386; *Kansas Pac. R. Co. v. Herring*, 110 U. S. 39, 14 Am. & Eng. R.

Fixing line of  
route—Filing  
map

Right to se-  
lect indemni-  
ty lands.

Cas. 537; *St. Paul, & S. C. R. Co. v. Winona, St. P. R. Co.*, 112 U. S. 731; *Vance v. Burlington & M. R. Co.* 12 Neb. 285, 10 Am. & Eng. R. Cas. 623. In *Weeks v. Bridgman*, 41 Minn. 356, the rule in respect to lands in place is stated to be this: "The laws relating to pre-emption remained operative until the line of location was definitely fixed even as to lands which might be found within the proper limits of the grant." And for still stronger reasons, the lieu lands must be deemed to remain open for settlement.

Presumptively, in this instance, the entire grant remained subject to pre-emption or homestead settlement until the 10th day of August, 1865, and the indemnity lands were also subject to such applications thereafter, until duly selected. The homestead entry of Johnson was made prior to the date referred to; and, unless the land had been previously withdrawn from entry, he had acquired vested rights of which he could not lawfully be deprived by the land department.

Pre-emption  
and home-  
stead rights.

It is, however, claimed that the land was withdrawn after the survey and location of the route upon the 18th day of June, 1857. It is intimated that there was a withdrawal of all the odd sections on the 14th day of March, 1857; but there is no evidence of this, and there is no such finding, and there certainly could be no warrant for such withdrawal. But the record shows that the following order was issued by the commissioner of the general land office on or about the date thereof: "General Land Office, March 26, 1858. Register and Receiver, Chatfield, Minn.—Gentlemen: Official notice, under date of the 22nd inst., has been given to this office by N. P. Causin, Esq., agent for Minnesota Territory, of the selection of the odd-numbered sections of land outside of the six and within the fifteen mile limits of the Southern Minnesota Railroad route for the benefit of said road, in pursuance of the provisions of the act of congress of March 3rd, 1857. You are therefore hereby instructed not to permit pre-emption declarations to be filed on or entries made of any lands in said sections by virtue of settlements made subsequent to the 22d inst. The even sections alternate to the sections above indicated are still subject to pre-emption at the rate of \$1.25 per acre. Very respectfully, THOS. A. HENDRICKS, Commissioner." It does not appear, however, that any map of the general route of the road or of the line located in June, 1857, was made and filed, or any record thereof made in the general land office, prior to August 10, 1865, so as to indicate the lines within which the withdrawal might become operative, or that any specific tract

Effect of with-  
drawal of  
land.



was within the land grant; and it seems to us that it was incumbent on the plaintiff to establish the existence of some such record as a part of its case, in order to give any effect to the withdrawal in this case. But, conceding that there was sufficient evidence before the commissioner to warrant the exercise of his discretion, and that the order should be treated as a valid executive order, authoritatively issued, it is clear that it did not operate to withdraw the particular tract in question, for a valid pre-emption right had already attached thereto, and it was then claimed and occupied by a qualified pre-emptor, whose declaratory statement had been duly filed. The land was not, therefore, withdrawn by that order. It stood just as if there had been no withdrawal at all, and, being within the indemnity belt, if it became vacant it would be subject to be selected for the plaintiff, unless sooner taken by a settler; but it would be open to the first comer, and when Rumrill relinquished his claim, and sold out his improvements to Johnson, it was open to the latter's homestead entry. This is in conformity with the uniform rulings and construction of the land department of the government extending through many years, as applied to indemnity lands as well as to those in place.

The withdrawal in this instance was not required by the act of congress, but was issued by the commissioner, and the construction given by the department to the effect of its own orders in such cases, and not in contravention of any rule of law, is entitled to great respect. And the rule adopted is to construe such orders strictly in favor of the government, that is to say as operating *in presenti*, and not *in futuro*, and lands are therefore excluded from a withdrawal as from a grant. It is eminently proper that the courts should place a similar construction upon these orders of the land department. *Hastings & D. R. Co. v. Whitney*, 132 U. S. 366, 40 Am. & Eng. R. Cas. 426, 34 Minn. 542, 24 Am. & Eng. R. Cas. 106, and cases cited. See *Prest v. Railroad Co.*, 2 Dec. Dep. Int. 506, and cases; *Railroad v. Waldron*, 7 Dec. Dep. Int. 182. Upon making her final proof, Drucilla Johnson's right to the land became complete. Her equitable title she then had a right to convey to the defendants, who stand in her shoes. *Lang v. Morey*, 40 Minn. 396, and cases cited. It is not material whether the naked legal title is still in the United States or has formally passed to the plaintiff. In either case the plaintiff is not entitled to recover in this action.

Judgment affirmed.

MITCHELL, J., took no part.

**Land Grants to Railroad Companies—Rights of Homestead and Pre-emption Claimants.**—See *Northern Pac. R. Co. v. Sanders* (C. C.) 46 Am. & Eng. R. Cas. 431, note 445; *Savannah etc. R. Co. v. Davis*, 43 *Id.* 542, note 649.

**Land Grant—When Pre-emption Right Attaches.**—In *Weeks v. Bridgman* (Minn. June 30, 1891) 49 N. W. Rep. 191, the land in controversy is within the limits of the land grant of the St. P. & P. R. Co., which claims title under the act of March 3, 1857. It was included in a section of land which was improved and occupied by a mail contractor in 1855, who claimed to be entitled to enter the same by pre-emption under the act of March 3, 1855, and his application to enter the same, afterwards recognized and approved by the land department of the government, was made before the railroad company became entitled to the land under the provisions of the land grant act. The court *held* that a pre-emption right had attached, within the meaning of the last named act, and that the section of land in controversy did not enure to the railway company as a part of its land grant.

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## UNITED STATES

*v.*

### SOUTHERN PACIFIC R. CO. *et al.*

(*U. S. Circuit Court, S. D. California, June 22, 1891,*  
*46 Fed. Rep. 683.*)

**Land Grant—Consolidation of Railroad Companies.**—The Act of Congress of March 3, 1871, authorized the Southern Pacific Railroad Company of California, subject to the laws of California, to construct a certain line of railroad, and granted it certain lands. The Southern Pacific Railroad Company, as it then existed, accepted said grant, and filed its plat of definite location in the proper office August 12, 1873. Said Southern Pacific Railroad Company, as authorized by the laws of California in force at the time of the passage of the Act of Congress, consolidated with other companies under the name of the Southern Pacific Railroad Company, a part of its object, as stated in the articles of amalgamation, being to construct the railroad mentioned in said act. Thereafter said consolidated company completely built said road, as required by said act, and the road so built was accepted by the president, and has performed, to the satisfaction of the government, all the services required of it under said act. *Held*, that said consolidated company, if not technically, is substantially, the same company to which said Act referred. Affirming *Southern Pac. R. Co. v. Poole*, 12 Sawy. (U. S.) 544, 32 Fed. Rep. 451; *U. S. v. Southern Pac. R. Co.*, and *U. S. v. Colton Marble & Lime Co.*, 45 Fed. Rep. 596.

**Amalgamation Recognized by Congress.**—Pursuant to state authority, recognized by and made a part of the congressional grant of March 3, 1871, the S. P. R. R. Co., April 15, 1871, filed amended articles of incorporation; and August 12, 1873, filed, together with the S. P. Branch R. R. Co., articles of amalgamation and consolidation, under the name of the S. P. R. R. Co. *Held*, that while in one sense a new corporation was formed, each was substantially and practically the same S. P. R. R. Co. mentioned in the acts of congress, and was so recognized by congress, and that the articles of amendment, amalgamation and consolidation were authorized by congressional as well as by state legislation.

**Same—Same.**—Commissioners having from time to time been appointed to report in regard to the construction of the Southern Pacific Railroad, the road having been accepted by the president, and having been used by the government in the transportation of mail, military stores, etc. *Held*, that these acts were acts recognizing the defendant company as the S. P. R. R. Co. to which the Act of March 3, 1871, applies, and that the defendant company, being subject to burdens imposed by the act, is entitled to the benefits conferred by it as a consideration for those burdens.

**Grant to Railroad Company—Its Successors and Assigns.**—Act Cong. July 27, 1866, having expressly granted lands to the S. P. R. R. Co., *its successors and assigns*, it is *held*, that if the consolidated company, with the amended articles of incorporation, is not technically the same corporation, referred to in Act March 3, 1871, it is within the express provisions of the grant, being the *successor or assign* of said company.

**Inchoate Grants Were not Contemplated by Congress** when it provided for deductions, but lands that had been effectively granted, and to which the title has passed, or shall effectively pass, and finally become effectively vested in the grantees upon the performance of the prescribed conditions.

**Proviso in Grant—Rights of Prior Grantee.**—The section of Act Cong. March 3, 1871, granting lands to the Southern Pacific Railroad Company, provided that said section should in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Company. *Held*, that this language did not constitute an exception from the grant, nor a reservation in favor of the United States, but that it made the grant to the Southern Pacific Railroad Company subject and subordinate to any rights the Atlantic & Pacific Company, a prior grantee, may then have secured, or might thereafter acquire under the law.

**Right to Earn Land Grant.**—The present and prospective rights of the Atlantic & Pacific Company were to secure the odd sections of land provided for along the line of the road they should build by actually building the road and earning the lands by performing the acts required. Their rights were to earn the lands, and not to obtain them without earning them.

**Forfeiture of Grant—Noncompliance with Conditions.**—As the Atlantic & Pacific Company never did comply with the condition of the grant to it, and as all of its rights thereunder became forfeited in 1886, by Act of Congress, because of such noncompliance, its rights have never ripened into an effective grant, and now they never can so ripen. The only condition imposed upon the grant to the Southern Pacific Railroad Company has thus become inoperative.

**Same—Failure of Prior Grant.**—The Southern Pacific Railroad Company, having performed all the conditions required of it by the Act of 1871, thereby acquired a right to the odd sections for the prescribed distance on each side of the road, subject only to be defeated by the Atlantic & Pacific Company having an older grant, and filing its map of definite location, and performing the other conditions necessary to earn the lands; but the Atlantic & Pacific Company never having performed said conditions, and its grant having been declared forfeited by congress, the lands never were granted to it, within the meaning of the Act of Congress, and the grant to the Southern Pacific Railroad Company therefore became effective and perfect without in any way affecting or impairing any rights of the Atlantic & Pacific Company.

**Act of 1866—Effect on Grant to Southern Pacific.**—No claim in the Act of July 27, 1866, granting lands to the Atlantic & Pacific Company under the facts before stated defeats the grant to the Southern Pacific Railroad Company to the odd sections lying within the primary limits of the grant.

IN Equity.

*W. H. H. Miller*, Atty. Gen., *Willoughby Cole*, U. S. Atty.,  
and *Joseph H. Call*, Sp. Asst. U. S. Atty.

*Joseph D. Redding* and *Chapman & Hendrick*, for defend-  
ants.

Before SAWYER, Circuit Judge, and Ross, District Judge.

SAWYER, J.—These are suits brought against the Southern Pacific Railroad Company, and parties who have purchased the land described, and derived title thereto from the Southern Pacific Railroad Company, to deter-  
Case stated—  
Statutory  
provisions.  
mine the adverse claim of title to said lands and to restrain defendants from cutting timber thereon, or from hereafter setting up any claim of title to said lands. The lands involved in suit No. 177 are sections 1, 11, and 13 of township 3, and section 35 of township 4 N., of range 15 W., San Bernardino meridian; and those in suit, No. 178, section 23, township 4 N., range 15 W., same meridian. These lands are claimed by defendants under the act of congress of March 3, 1871, "to incorporate the Texas Pacific Railroad Co., and to aid in the construction of its road, and for other purposes." 16 St. 573. Section 23 of said act is as follows: "That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (*subject to the laws of California*) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six." 16 St. 579.

Section 18 of the act conferring rights upon the Atlantic & Pacific Railroad, referred to in the section quoted and conferring the rights under which defendants claim, is in the following language: "That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic & Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to

time and manner, with the Atlantic & Pacific Railroad herein provided for."

And the provision of the same act, made applicable to the Southern Pacific Railroad Company, and granting it lands putting it upon the same footing in all particulars with the Atlantic & Pacific Railroad Company incorporated by the same act, is as follows: "And be it further enacted, that there be and hereby is granted to the Atlantic & Pacific Railroad Company, [substitute Southern Pacific Railroad Company,] its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been *heretofore granted* by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted, shall be deducted from the amount granted by this act." 14 St. 294, § 3.

Substitute in this section the words, "the Southern Pacific Railroad Company" for the words, "the Atlantic & Pacific Railroad Company," and we shall have the grant to the Southern Pacific Railroad Company both by the act of 1866, and the act of 1871.

Soon after the passage of the said act of March 3, 1871, to wit: on April 3, 1871, the Southern Pacific Railroad Company as it then existed, designated the line of its road from

Tehachapa Pass by way of Los Angeles, to Fort Yuma, on the Colorado river, which it on that day filed in the office of the commissioner of the general land office, and thereby the grant under said act of congress attached to all the odd sections of land, to which it could attach under the provisions of said act of congress. Afterwards, on the 12th day of August, 1873, the said Southern Pacific Railroad Company, in all respects as authorized by the laws of the state of California, existing and in force before and at the time of the passage of said act of congress of March 3, 1871, incorporating the Texas Pacific Railroad Company, amalgamated and consolidated with several smaller companies as shown by Exhibits A, B, annexed to the bill of complaint in these cases; the said consolidated company being called by the name of "The Southern Pacific Railroad Company," a part of the object stated in said articles of amalgamation being to construct "a line of railroad from a point at or near Tehachapa Pass by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, a distance of three hundred and twenty-four miles as near as may be," in pursuance of said provisions granting the right so to build a railroad to the Southern Pacific Railroad Company as provided in said section 23, in said act, incorporating said Texas Pacific Railroad Company, hereinbefore cited, said company having been amalgamated and consolidated under the same name and style as the principal company so incorporated and amalgamated, viz.: "The Southern Pacific Railroad Company." The said amalgamated and consolidated company afterwards built the said railroad along the line so hereinbefore designated from Tehachapa Pass by the way of Los Angeles to the Colorado river, and fully completed the same within the time, and in all respects, as required by said act of congress; and the said several sections were examined from time to time, and reported upon to the president by commissioners appointed for the purpose, and the whole line accepted by the president. Ever since its completion and acceptance, the said road has performed to the satisfaction of the United States government, all the services, such as carrying the mails, transporting troops, supplies, etc., in all respects as required by the provisions of said act of congress incorporating the Texas Pacific Railroad Company; and said services have been accepted by the United States.

The Atlantic & Pacific Railroad Company, on March 12, 1872, long subsequent to the definite location of the line of the Southern Pacific line, and after it commenced building its road, filed in the office of the secretary of the interior—not in the office of the commissioner of the general land

office—two maps of portions of a line of road in the state of California. These were the first maps of any part of the contemplated road in California ever filed. These maps are designated “Master’s Exhibits Nos. 122 and 127.” Some time subsequently, the said company filed in the same office, two other maps designated “Master’s Exhibits Nos. 130 and 131.” These are the only maps filed relating to the location of the California portion of the Atlantic & Pacific road. The Atlantic & Pacific Railroad Company never constructed any portion of the road authorized to be constructed by it, in the state of California; and for failure to construct said road or any part of it, congress, on July 6, 1886, passed an act declaring a forfeiture of all lands within the state of California, before granted to it, to aid in the construction of the road. 24 St. 123. The line of the Atlantic & Pacific Railroad, as shown upon said maps filed in the office of the secretary of the interior, crosses the line of the Southern Pacific Railroad as located by its said maps and as constructed from Tehachapa Pass by the way of Los Angeles to the Colorado river, but said lines are not located along the same general route. The lands in controversy lie within 20 miles of both of said lines as so located and shown, where they cross each other. The said lands have been conveyed by the said Southern Pacific Railroad Company, respondent, which constructed its road as aforesaid, to the other respondents to this suit, and the title so conveyed, is now vested in them.

The first point made by complainants is, that the present Southern Pacific Railroad Company, which built the road after the amalgamation and consolidation with sundry smaller roads mentioned, under the same name as the old company, and professedly for the same purpose, made in pursuance of the statutes of the state of California, authorizing such consolidation and amalgamation, which statutes were in force at the date of the congressional grant in question, and prior to which consolidation the grant by congress was made, and which road was to be built in accordance with the laws of the state of California, is not the identical Southern Pacific Railroad Company, to which the act referred, and the grant was made, and therefore, that the defendant took nothing under the act of congress.

This point is not new in this court, as it was fully considered and overruled in *Southern Pac. R. Co. v. Poole*, 12 Sawy. (U. S.) 544, 545, 32 Fed. Rep. 451. Again, the point was made and earnestly urged in the southern district of California, in *U. S. v. Southern Pac. R. Co.* and *U. S. v. Colton, Marble & Lime Co.*, and the district judge in an able opin-

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ion, concurred in, on this point, by the circuit judge, thoroughly examined the point, and overruled it, citing with approval also the case of *Southern Pac. R. Co. v. Poole*, referred to, and affirming it. (14 Sawy. (U. S.) 623, 45 Fed. Rep. 596 *et seq.*) See, also, *Southern Pac. R. Co. v. Orton*, 6 Sawy. (U. S.) 160, 32 Fed. Rep. 457. We shall adhere to the ruling made in these cases till the point is otherwise determined by the supreme court.

It is earnestly urged on the part of the respondents, that the filing in the office of the *secretary of the interior*, of the fragmentary maps of the location of the line of the contemplated Atlantic & Pacific road, and to points not authorized by the law, does not constitute a location of the line in such sense, or legal form, as to give any right whatever under the act, to the Atlantic & Pacific Company; and, that, it in no way affects the action or rights of the Southern Pacific Company. For the purposes of this case, however, without deciding, or discussing the matter, I shall assume that the filing of these maps in the office of the secretary of the interior, instead of the commissioner of the general land office, to have been so far regular, and in accordance with the law granting the rights contemplated to the company, since, upon the view I take upon the rights of the parties, and of the effect of the act forfeiting the grant to the Atlantic & Pacific Company, it will not be necessary to decide the point raised.

The only remaining question is, whether, in view of all the facts of the case, the clause in the provision of section 23 in the act of 1871, "that this section shall in no way affect or impair the rights, present, or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company," or any clause in the act of 1866, under the facts of the case, defeats the grant to the Southern Pacific Railroad Company to these lands, which lie within the primary limits of the grant? This question did not arise in *U. S. v. Southern Pac. R. Co.* and *U. S. v. Colton Marble & Lime Co.*, 14 Sawy. (U. S.) 620, 45 Fed. Rep. 596. It is now directly presented however, and we address ourselves to its consideration and solution. In my judgment, neither the proviso to section 23 of the act of 1871, nor any provision of the act of 1866, defeats the title to the lands in question, in view of all the facts in the case. That proviso is as follows: "Provided however, that this section shall in no way affect or impair the *rights present or prospective* of the Atlantic & Pacific Railroad Company, or any other company." Now what is the fair import of this language? What was the intent of congress, in view of the important objects



sought, in making the grant to respondents, in adopting this peculiar language? It is not the language of exception from the grant, of any lands that the Atlantic & Pacific Company might lay claim to without earning them under the statute. It is not the language of exception at all. On the contrary, it merely made the grant to defendant, subordinate, and subject to any rights, that the Atlantic & Pacific Company may then have secured, or might thereafter, acquire under the law, authorizing it to acquire lands, by the performance of the acts prescribed. Congress intended that the respondent should not interfere with any lands which that other company should lawfully earn. It simply intended to protect any rights, that it should acquire, by performing the required acts. What were "the rights, present and prospective of the Atlantic & Pacific Railroad Company?" Their rights were to secure the odd sections of land provided for along the line of *the road they should build, by actually building the road, and earning the lands by performing the acts required. Their rights were to earn the lands, and not to obtain them without earning them.* Congress has nowhere provided, or contemplated, that this company should file a plat of a route for a railroad, and then play the role of the dog in the manger, and neither build the road itself, and thereby earn the lands, nor allow the respondents to build one, and earn the lands under another grant. The Atlantic & Pacific Company never did anything to earn these lands, except to file, what it was pleased to term a "map of the location of its route," six years after the date of the grant, and one year after the respondent had located its road under the grant, made five years subsequently, and after it had commenced building the road; and for failure to comply with the terms of the grant, by the Atlantic & Pacific Company; congress, in 1886, (24 St. 123, 124.) passed an act forfeiting its right to earn these lands altogether. Thus its rights "present" and "prospective," have never ripened into an effective grant, and now they never can so ripen. They now have, and can have no further rights in these lands, whether the respondents get them or not. The building of its road; by the respondents, and earning these lands, which the other party has itself failed to earn, and now never can earn, can in no possible way "effect or impair" any rights the other company now has, or ever did have. And had that company built the road, and earned the lands, the respondent would not have got them, for that would have been to affect or impair its rights.

The *present* right of the Atlantic & Pacific Company was to earn the lands by the performance of the required conditions, and the *prospective* rights, the right to have the lands

when so earned. This is all there is of it, and it did neither. Now the grant to the Southern Pacific, being subject, and subordinate, to those rights, could not in any way, or in any degree, have affected, or impaired them, because the Atlantic & Pacific Railroad Company, had it performed the conditions would have taken the said land under the act. It utterly failed to perform the conditions, and all its rights have been forfeited, and now the patenting of the lands to the Southern Pacific cannot in any way possible affect any of these rights which do not now exist. Thus the rights of the Atlantic & Pacific Company present or prospective, never could have been affected by the acts of the Southern Pacific, which only took the lands in case the other company did not. It seems to me, that any other view, is utterly untenable. The respondent was in the position, that it was compelled to take its grant subordinate, and subject to the prior grant. It only took what would not be required to satisfy the prior valid claim, had the work been performed. The prior claimant failed to acquire any real right to the lands, by earning them, and they were forfeited and left to the respondent to earn under its grant, and it has faithfully earned them without in the slightest degree "affecting or impairing any prior rights" "present or prospective," and it now cannot impair them. It seems to me, that the respondent is justly entitled to these lands under its grant. An exception, from a grant, is an entirely different matter from taking a grant subject to other claims or rights, as is, manifestly, the case here. When the other claims are satisfied, or lost, the grantee, subject to those rights, takes what is left. The proviso in section 23 of the act of 1871, *seems to me, clearly to prescribe all the limitations intended by congress in that act to be put upon the grant to respondent.* It is specific and clear on this point, and, only intended to be subject to any rights that should be actually acquired and perfected under any prior act. The reference to the act of 1866, does not modify the provision in this particular section. It puts no restriction upon respondent, not expressly put upon the Southern Pacific Company by the act of 1866, and that act, in the precise language used, taken literally, or substantially, does not affect this point. In that act, the Southern Pacific Company was put upon the precise footing with the Atlantic & Pacific Company. Both took under the same act, upon equal terms. In the act of 1871, the Southern Pacific Company was put upon the same footing as the Southern Pacific Company was put by the act of 1866. The proviso in section 3 of the latter act is—"That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been

heretofore granted by the United States, *as far as the routes are upon the same general line*, the amount of land heretofore granted shall be deducted from the amount granted by this act." The language is "*have been heretofore granted*;" that is to say, granted *before the passage of the act of 1866, not the act of 1871*. The rights of the Southern Pacific, granted by section 18, were not affected by any act that should be thereafter passed, and the rights of the Southern Pacific Company under the act of 1871, are the same as those of the Southern Pacific Company under the act of 1866, and under this proviso are only affected by grants made *prior to the passage of the act of 1866*. To hold otherwise, would be, to change the language of the acts. But the line of the Southern Pacific road is not on the line of the "Atlantic and Pacific" route as designated on what is claimed to be its map of location. The two roads are not "upon the same general line." They simply cross each other. But again: The fair construction of this proviso, and as it was intended by congress, in view of the object sought is, that "lands that have *heretofore* been granted," and "the amount of land" to be dedicated, means lands that have been *effectively granted*, and to which the title has passed, or shall *effectively pass out of the United States, and finally become effectively vested in the grantees upon the performance of the prescribed conditions*. It does not mean inchoate grants, that are not finally perfected—grants that become forfeited by failure to earn them by performing the prescribed conditions or any of them. These do not, ultimately, become grants at all, within the meaning of the act, and intent of congress. Congress was anxious to procure the construction of these great works, for military, mail-carrying, and other uses, and thereby also develop the resources of the country, and make a market for the public lands. It contributed *nothing*, because it received double price for the even sections. In these provisions, it was only solicitous to protect the vested rights of prior grantees in lands fairly earned in constructing works of a similar kind in pursuance of a similar policy. It did not seek, by forfeitures, to evade its obligations to subsequent roads, and thereby increase its own property, at the expense of those who actually carry out the objects of the law, and fairly earn the lands intended for them. We cannot attribute any such unworthy purpose, or motive to congress. It manifestly, intended, that the subsequent grantees should take the odd sections subject only to prior rights, and when the prior grants failed, and finally, became no grants, by reasons of a failure to perform the conditions necessary to perfect the grant, and when no rights

can possibly be further affected by the grant to the subsequent grantee, that the latter, upon complying with the terms of its grant should have the lands, not ultimately, or effectively granted under the prior acts of congress. Effective, completed grants only, are contemplated in this proviso.

Now, in my judgment, the case is clearly this, and nothing more. The act of 1866 gave the Atlantic & Pacific Company the right to build a railroad with the right of location within the provisions of the acts; to receive the odd sections of land along the general line of its route, upon building the road as required, but upon no other conditions. The grantee did not, for six years, do anything to locate its road in the state of California, or earn the grant. The act of 1871 was passed, making a similar grant to respondent, subject however to any prior rights of the other company. *Within a month* it filed its map of location, and immediately, went to work and continued till it performed all the required conditions, had its road completed, and accepted by the president, and earned its lands. By filing its map of definite location, it acquired a right to the odd sections for the prescribed distance on each side of the road, subject *only* to be defeated by the Atlantic & Pacific Company, having an older grant, by filing its map of definite location, *and then performing the other conditions necessary to earn the lands.* At the time of locating the Southern Pacific line; there was nothing to indicate that the Atlantic & Pacific would ever move in the matter. A year afterwards, and six years after the date of its grant, the Atlantic & Pacific Company filed what is claimed to be its definite location; and by that act, if properly done, and not already *too late*, under the law, it acquired what? Not a perfect, or complete title, to the land but at most a temporary provisional title, with a right to build the road, earn the lands, along its line, perfect its title, and defeat the right of the respondents to acquire the land. But it did nothing more, and, after waiting 20 years for it, without anything more being done, congress passed the act referred to, forfeiting its grant, and the lands never were fully granted—never became granted, within the reasonable meaning of the act of congress providing for deducting therefrom subsequent grants, and thereby the grant to respondents became effective and perfect, without in the slightest degree, or “in any way,” “affecting” or “impairing any right,” “present or prospective” of the Atlantic & Pacific Company, or any other prior grantee. If this be not the true view of the case, then no lands could have been acquired by the respondents under its grants, and the act, purporting to be a grant, as to it, was a dead letter—a mere illusion; for, if

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the acts mentioned, performed by the Atlantic & Pacific Company, at that date could utterly defeat the grant of these lands as to the respondents, any location respondents could have made, could have been defeated by similar action, and the thereafter, non-action of the Atlantic & Pacific Company; for it could subsequently locate upon the same line, in the same sense, as that upon which respondents did locate, and in the same manner, defeat the latter grant.

I am, therefore, of the opinion, that the earning and acquiring of these lands by the respondents, under the conditions shown by the record, in no way affected, or impaired, the "rights present or prospective," of the Atlantic & Pacific Railroad Company, or any other, within the meaning of the act of congress; and that, these lands are not lands heretofore, or at any time, granted by the act of congress in such sense as to require them to be deducted along the general line of the road, or otherwise, within the meaning of the acts of congress of 1866, and 1871, or of either of them.

Under the views expressed, the amended bills must be dismissed, and it is so ordered, without costs.

ROSS, J.—These cases have been argued and submitted together. The suits are brought to quiet the complainants' alleged title to certain lands and to enjoin defendant from asserting or claiming any title thereto. The lands are claimed by the defendant by virtue of the act of congress of March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes." 16 St. U. S. 573. By the 23d section of that act it was provided as follows: "That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866: provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

The evidence in the case shows that the defendant company accepted this grant and on the 3d of April, 1871, filed in the office of the commissioner of the general land office, a plat showing the definite location of the road it was thereby au-

thorized to build, and proceeded to build it and completed its construction, to the satisfaction of the government, in January, 1878. It thereby earned the lands embraced by the grant to it. The point that the present Southern Pacific Railroad Company is not the same Southern Pacific Railroad Company to which the act of March 3, 1871, applied, was decided against the government in the recent cases of *U. S. v. Southern Pac. R. Co.* and *U. S. v. Colton Marble & Lime Co.*, 45 Fed. Rep. 596, (March 6, 1891.) The reasons for so holding were given at length in the opinions then rendered, and need not now be repeated.

It is admitted that the lands in controversy in the present suits are situate within 20 miles of the line of road so located and built by the Southern Pacific Company, but as they are also within 20 miles of the line that the Atlantic & Pacific Railroad Company, under the act of congress of July 27, 1866, designated for its road, it is earnestly contended on behalf of the government that they are excluded from the grant to the Southern Pacific Company. When the cases of *U. S. v. Southern Pac. R. Co.* and *U. S. v. Colton Marble & Lime Co.*, 39 Fed. Rep. 132, were before the court on demurrers to the bills—the lands then involved being within the *indemnity* limits of the Atlantic & Pacific grant and within the primary limits of that to the Southern Pacific Company—it was said: "Had they been situated within 20 miles of the designated route of the Atlantic & Pacific Company they would clearly have fallen within the grant to that company and consequently have been excluded from the subsequent grant to the Southern Pacific Company; for, if the construction above put upon the act of July 27, 1866, be the correct one, every alternate section of public land, designated by odd numbers, within 20 miles of the line of the road, as definitely fixed, would have passed to the Atlantic & Pacific Company as of the date of its grant." That, though *obiter*, would undoubtedly have been so had the Atlantic & Pacific Company earned the lands by building the road for which the grant was made. But is it true where it appears that the road was not built and where the grant to the Atlantic & Pacific Company for that reason has been subsequently declared forfeited by congress? is the question now involved and to be decided. The grant to the Atlantic & Pacific Company was the prior grant—it having been made by the act of July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line in the states of Missouri and Arkansas to the Pacific coast." 14 St. U. S. 293. By that act the Atlantic & Pacific Company was authorized to construct a railroad—"Beginning at or near the town of Springfield, in the state of Missouri, thence to the

western boundary of said state, and thence, by the most eligible railroad route as shall be determined by the said company, to a point on the Canadian river; thence to the town of Albuquerque on the river Del Norte, and thence by way of the Agua Frio or other suitable pass to the headwaters of the Colorado Chiquito, and thence along the 35th parallel of latitude, as near as may be found most suitable for a railroad route, to the Colorado river at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific."

To aid in the construction of the road there was granted to the Atlantic & Pacific Company, by the third section of the act, every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 sections on each side of the road whenever it passes through a state—"And whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land office, and whenever," etc.

The Atlantic & Pacific Company did nothing towards locating its line of road in California until March 12, 1872, and never did do anything towards building it; in consequence of which congress, in 1886, passed an act declaring its land grant forfeited. In the mean time, that is to say, March 3, 1871, the grant under which the defendant company claims the lands in controversy was made. Those lands were at that date public lands in the United States, for it is not pretended that the Atlantic & Pacific Company designated the route of its road prior to March, 1872, and its grant, as has been seen, was only for such public lands, designated by odd numbers and non-mineral in character, as should fall within the designated limits and be, *at the time the line of its road should be designated by a plat thereof filed in the office of the commissioner of the general land office*, not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights. No valid reason, therefore, existed why congress could not include the lands in controversy in the grant it made to the Southern Pacific Railroad Company. Did it do so? The act of March 3, 1871, refers to that of July 27, 1866, for the terms of the grant thereby made to the Southern Pacific Company to aid it in building a road from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco. The grant was for 10

odd-numbered sections of public land, not mineral, on each side of the road. As has already been said, the lands in controversy here were at that time public lands of the United States. They are within 20 miles of the line of road the Southern Pacific Company was by the act of March 3, 1871, authorized to locate and build and which it did locate and build and which the government accepted as having been built in compliance with the terms of that act and which it has since used for its own purposes. The lands in controversy are therefore within the primary limits of that grant and justly belong to the Southern Pacific Company unless there be something in the act of March 3, 1871, excluding them from the grant thereby made to it. It is urged that such exclusion is effected by the concluding clause of the section making the grant, which is in these words: "Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company."

It is plain that this clause is not in the form of an exception from the grant. Congress was, of course, aware of its previous grant to the Atlantic & Pacific Company of date July 27, 1866, and being desirous of making that to the Southern Pacific Company subordinate and subject to its previous grants, inserted the proviso that the grant to the Southern Pacific Company should "in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Company, or any other railroad company." This is by no means saying, nor is it the equivalent of saying, that any public lands of the United States that would otherwise be embraced by the grant to the Southern Pacific Company should be excluded from that grant. It was not to reserve anything to the United States, but to protect the "present and prospective" rights of the Atlantic & Pacific Company and any other railroad company to which congress may have made grants of lands that the proviso was inserted. Had the line of road the Atlantic & Pacific Company was authorized to build by the act of July 27, 1866, been definitely located at the time of the grant to the Southern Pacific Company of March 3, 1871, and had the Atlantic & Pacific Company thereafter built its road and thereby earned the lands covered by its grant, the lands in controversy would have gone to it without regard to the proviso in question; for its grant which would have attached to such lands at the time of the definite location of the route of its road would have been perfected by the building of the road and the title thus perfected have related back to the date of the grant, July 27, 1866, and of course have excluded any subsequent grant cov-



ering the same lands. But the Atlantic & Pacific Company had not designated the route of its road at the time of the grant to the Southern Pacific Company of March 3, 1871. It might do so, however, thereafter and might build the road it was authorized to build and thereby earn the lands embraced by the grant to it of July 27, 1866. It had a "present and prospective" right to do so. If it did both of those things, it would be entitled to the lands granted to it by that act. If it did not do both of those things, it would not be so entitled and the lands would remain as they then were, public lands of the United States. Congress, therefore, in making its grant to the Southern Pacific Company of March 3, 1871, made it subject to those "present and prospective" rights. Had they been perfected by a compliance on the part of the Atlantic & Pacific Company with the conditions on which they were based, the title to the lands in controversy would have become vested in the Atlantic & Pacific Company as of date July 27, 1866. But as that company never did comply with the conditions of the grant and as all of its rights thereunder became forfeited in 1886 by act of congress because of such non-compliance, there remain no rights of that company to be, or that ever can be, affected or impaired by the grant to the Southern Pacific Company of March 3, 1871. The proviso to the twenty-third section of that act, in my opinion, was only intended to protect, and its scope went only to the protection of, the rights of the Atlantic & Pacific Company and any other railroad company to which congress had previously made a grant. It was not intended to reserve to the United States any land that would otherwise be included in the granting clause of the act. The lands in controversy were public lands of the United States at the time of that grant; the terms of the granting clause include them, provided, *only*, that the grant be without prejudice to the present or prospective rights of the Atlantic & Pacific Railroad Company, or any other railroad company. The Atlantic & Pacific Company having forfeited its right to earn the lands in question by failing to build the road it was required to build as a consideration for the grant, it never acquired any title thereto and thenceforward there remained no right, "present or prospective," to be affected or impaired. When its rights became forfeited (there being no pretense that the case is affected by the rights of any other railroad company than those herein spoken of) there came to an end the only condition imposed by congress upon the grant to the Southern Pacific Company of March 3, 1871.

These views render it unnecessary to determine the question elaborately and ably argued by counsel as to whether

there ever was a valid designation of the route of the proposed road of the Atlantic & Pacific Company.

I concur in the dismissal of the amended bill in each case, without costs, and wish to add that I would not have written this brief opinion had I known the circuit judge was engaged in the preparation of an opinion; but as each of us reached the same conclusion in a separate examination of the cases, at his suggestion both opinions are filed.

**Land Grants—Effect of Consolidation of Railroad Companies.**—See *United States v. Southern Pac. R. Co.* (C. C.) 46 Am. & Eng. R. Cas. 395.

**Compensation for Carrying Mails—Railroads Constructed by Land Grant.**—The postal appropriation act of July 12, 1876, chap. 179, fixed a rate of pay to railroads for carrying the mails, and provided that roads constructed in whole or in part by a land grant, conditioned that mails should be transported at a rate to be fixed by Congress, should receive only 80 per cent. of that rate. As applied to a line of road a part of which only was constructed with such aid, the department held, and acted in accordance therewith for many years, that it was entitled to the percentage pay for the portion of the line so constructed, and to full pay for the remainder. Subsequently, the Department reversed this construction, and claimed that the mails should be carried over the whole line at a reduced rate, and it accordingly withheld from sums due for current transportation not only the 20 per cent. thereon, but a sufficient amount to settle claims for past transportation on that basis. The railroad company sued to recover the pay withheld. The Court of Claims gave judgment in its favor, and the Supreme Court affirms that judgment. *U. S. v. Alabama Great Southern R. Co.*, 142 U. S. 615.

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## SIoux CITY AND IOWA FALLS TOWN LOT AND LAND CO.

v.

GRIFFEY.

(143 U. S. 32.)

**Land Grant—Grant in Presenti—When Grant Attaches.**—The grant of public land to the state of Iowa by the Act of Congress of May 15, 1856, 11 Stat. 9, chap. 28, "in alternate sections to aid in the construction" of railroads, was a grant *in presenti*, which did not attach until the time of the filing of the map of definite location of such railroads; although the beneficiary company (under the Iowa statute) may have surveyed and staked out a line for its road before the filing.

**Same—Pre-emption Claim—Bona Fides.**—The plaintiff, claiming under the said grant, brought an action against the defendant to recover a tract, a part of the grant. The defendant claimed under a patent from the United States subsequent to the filing of the map of definite location, but issued on a pre-emption claim made prior thereto, and filed a cross bill for quieting his title. *Held*, that the *bona fides* of the pre-emption settlement could not be contested by the plaintiff.

IN error to the Supreme Court of the State of Iowa.

*Wm. L. Foy* and *W. C. Goudy*, for plaintiff in error.

*S. S. Burdett* and *O. C. Treadway*, for defendants in error.

BREWER, J.—On May 15, 1856, congress passed an act granting lands to the state of Iowa to aid in the construction of certain railroads. 11 St. p. 9. The grant was a *Case stated.* grant *in presenti*, and of alternate sections, with the familiar provision: "But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said state, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid."

By an act of the general assembly of Iowa, of date July 14, 1856, the Dubuque & Pacific Railroad Company was made one of the beneficiaries of this grant. By section 6 it was provided: "The lines and routes of the several roads above described shall be definitely fixed and located on or before the first day of April next after the passage of this act, and maps or plats showing such lines or routes shall be filed in the office of the governor of the state of Iowa, and also in the office of the secretary of the state of Iowa. It shall be the duty of the governor, after affixing his official signature, to file such map in the department having the control of the public lands in Washington, such location to be considered final only so far as to fix the limits and boundary in which said lands may be selected." The map of the definite location thus provided for was not received by the officers of the state until after September 27, 1856, and was filed at the general land office in Washington on October 13, 1856. Prior, however, to the 14th day of July, and the passage of the act making it the beneficiary of the congressional grant, the Dubuque & Pacific Railroad Company had commenced the survey of its line, and had surveyed and staked out a line upon the surface of the ground along the land in controversy, which, by such survey, was within the limits of the grant. On the 19th of July, 1856, Griffey entered upon this land, filed his declaratory statement, and on the 5th of September located it with a military bounty land warrant, and received his certificate of location.

The first and principal question is at what time the title of the railroad company attached,—whether at the time the map of definite location was filed in the general land office at Washington, or when, prior thereto, its line was surveyed and staked out on the surface of the ground. While the question, in this precise form, has never been before this court, yet the question as to the time at which the title attaches, under grants similar to this, has been often presented, and the uniform ruling has been that it attaches at the time of the filing of the map of definite location. *Grinnell v. Chicago, R. I. & P. R. Co.*, 103 U. S. 739; 5 Am. & Eng. R. Cas. 447; *Van Wyck v. Knevals*, 106 U. S. 360, 366, 10 Am. & Eng. R. Cas. 664; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, 634; *Walden v. Knevals*, 114 U. S. 373; *U. S. v. Missouri K. & T. R. Co.*, 141 U. S. 358, 375.

When grant attached.

In *Van Wyck v. Knevals*, where the question arose between Knevals, the grantee of the railroad company, and Van Wyck, who had entered the lands at the local land office after the filing of the map of definite location with the land department, but before notice thereof had been received at such local land office, this court said: "The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the secretary of the interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company, and a map designating it is filed with the secretary of the interior and accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent."

And in *Kansas Pac. R. Co. v. Dunmeyer* it is also said: "We are of opinion that under this grant, as under many other grants containing the same words, or words to the same purport, the act which fixes the time of definite location is the act of filing the map or plat of this line in the office of the commissioner of the general land office. The necessity of having certainty in the act fixing this time is obvious. Up to that time the right of the company to no definite section or part of section is fixed. Until then many rights to the land along which the road finally runs may attach, which will be paramount to that of the company building the road. After this no such rights can attach, because the right of the company becomes by that act vested. It is important,

therefore, that this act fixing these rights shall be one which is open to inspection. At the same time it is an act to be done by the company. The company makes its own preliminary and final surveys by its own officers. It selects for itself the precise line on which the road is to be built, and it is by law bound to report its action by filing its map with the commissioner, or, rather, in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party."

The reasoning of these opinions is applicable here. The fact that the company has surveyed and staked a line upon the ground does not conclude it. It may survey and stake many, and finally determine the line upon which it will build by a comparison of the cost and advantages of each; and only when, by filing its map, it has communicated to the government knowledge of its selected line, is it concluded by its action. Then, so far as the purposes of the land grant are concerned, is its line definitely fixed; and it cannot thereafter, without the consent of the government, change that line so as to affect titles accruing thereunder. In accordance with these decisions it must therefore be held that the line was not definitely fixed until the 13th of October, 1856.

Inasmuch as Griffey's pre-emption right had attached to this land prior to such time, it did not pass to the railroad com-

**Pre-emption  
claim—Bona  
fides.**

pany under the grant: and it was a matter of no moment to the company what thereafter became of the title. This is settled by the case of *Kansas Pac. R. Co. v. Dunmeyer*, in which it was said: "It is not conceivable that congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations." And, again: "Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the

grant as much as if in a deed it had been excluded from the conveyance by metes and bounds." See, also, *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 40 Am. & Eng. R. Cas. 426; in which was a similar ruling.

The only other question we deem important is this: On July 5, 1871, the state of Iowa issued a patent, under which plaintiff in error claims, and on June 30, 1882, the United States issued a patent to Griffey, which is the basis of defendants' title. The defendants filed, as was authorized under the Iowa statute, a cross petition, praying to quiet their title, and the decree entered was one dismissing the plaintiff's bill and quieting defendant's title.

Now, it is claimed that Griffey never complied with the pre-emption laws; that he never made a *bona fide* settlement; that he secured his pre-emption rights by false representations and a pretended settlement; that he does not come into a court of equity with clean hands, and is entitled to no relief; and that, therefore, there was error in entering a decree in favor of the defendants upon the cross petition. But, as we have seen, Griffey did make a settlement, file his declaratory statement, and thus initiate a pre-emption right. By these means such pre-emption right had, in the language of the statute, attached. The land, therefore, did not pass under the railroad grant. It was no matter of interest to the company what became of the title. The government—the owner of the land—was satisfied with what Griffey had done, took from him its land warrant as payment, and patented the land. Into the *bona fides* of this transaction no one but the government can inquire. As the title was beyond challenge on the part of the railroad company, it had no right to cast a cloud thereupon, and, having done so by accepting a patent from the state of Iowa, under the pretense that the land was a part of the grant made to that state, and having affirmed the validity of the title conveyed by such patent, it does not lie in its mouth, or with those claiming under it, to now object to a decree removing all cloud cast by such patent.

We see no error in the rulings of the supreme court of Iowa, and its judgment is affirmed.

## HAMILTON

v.

SPOKANE & PALOUSE R. CO. *et al.**(Idaho Supreme Court, Dec. 8, 1891.)*

**Public Lands—Grant of Right of Way—Pre-emption Filing—Homestead Entry.**—One Wilkins filed declaratory statement November 7, 1888, and relinquished the same October 5, 1889, on which day Daniel made homestead entry of the same tract, and on April 29, 1890, made cash entry of said track, and on September 3, 1890, conveyed by warranty deed to Hamilton a portion of said tract. The railroad company claims right of way over tract conveyed to Hamilton, by reason of compliance with Act of Congress of March 3, 1875, and the approval of the plat by the secretary of the interior, July 11, 1889. Hamilton claims damages because of company grading its roadbed through said conveyed tract. *Held*, that Wilkin's pre-emption filing did not exempt said land from the grant of right of way to the company, as he relinquished the same before perfecting the title; that there was no privity of estate between said Wilkins and Daniel; that patent to Daniel would take effect, by relation, October 5, 1889, the date of Daniel's homestead entry, and would not antedate the grant to the company.

**Land Grant and Grant of Right of Way Distinguished.**—Distinction between grants of land to aid in construction of railroads and grants of right of way commented upon.

APPEAL from Latah District Court:

*Albert Hagan*, for appellant.

*J. A. C. Freund*, for respondent.

SULLIVAN, C. J.—This is an action brought by the respondent (plaintiff below) against the appellant (defendant below, and three other defendants, who are not appellants here) to recover \$250, damages alleged to have been sustained by reason of appellant having graded a railway roadbed through land claimed by the respondent, and for hauling and piling dirt upon said land. The complaint alleges that the defendant is a railroad corporation; that the plaintiff, on the 3d day of September, 1890, was, and ever since has been, the owner of a piece or parcel of land, being a part of lot 4, section 7, township 39 N., range 3 W., B. M., containing an area of 2.28 acres, and described said parcel of land by metes and bounds; and, further, that the appellant, on the 20th day of November, 1890, entered upon said land unlawfully and with force, against the wishes of respondent, and hauled a large quantity of dirt upon and graded a roadbed for a railroad track through said land, to

plaintiff's damage in the sum of \$250, for which sum judgment is demanded. The appellant by its answer admits that it is a duly organized and existing railroad corporation, and denies all other allegations of the complaint, except the allegation that it entered upon said land and graded a railway roadbed through said land. The answer further states that the appellant claims the right of way over the said tract of land by virtue of an act of congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States;" and that it acquired the right of way over said land to the extent of 100 feet from each side of the middle of its track by reason of a compliance with the terms and conditions of said act of congress; and denies that plaintiff is damaged in any sense whatever by reason of said roadbed having been graded across said land. The court tried the cause without a jury, and entered judgment against the appellant for \$250, damages and costs of suit. From that judgment the appellant brings the case to this court, and demands a reversal thereof, and assigns six specifications of error as ground therefor.

The first and second specifications of error are substantially as follows, and will be considered together: That there are no findings to sustain the judgment; that a written decision of the court is not a finding, and will not sustain a judgment; that, even if the written decision is a finding, it will not sustain the judgment. I do not think the objections raised by these specifications of error well taken. I am of the opinion that the written decision of the court below contains findings of fact and conclusions of law sufficient to sustain the judgment of the court below, provided such finding of acts warrants the conclusions of law. I will, however, say that the document containing the finding of facts and conclusions of law is contained in the transcript, and covers 18 printed pages thereof. Said document contains a statement of the contents of the pleadings, the substance of the testimony, and a review and comment on the authorities cited by counsel on the argument of the case in the court below, and the reasons for the decision, but fails to technically comply with section 4407 of the Revised Statutes. Said section requires the trial court, when a case is tried to the court without a jury, to give its decision in writing, in which the facts found and the conclusions of law applicable to such facts must be separately stated. The decision should not contain a statement of the case and the reason for the decision. The said document is, technically speaking, an opinion, rather than a decision, within the meaning of the term "decision" as used

What decision of court should contain.



in said section 4407. The "decision" should contain only the ultimate facts established by the evidence, and the conclusions of law resulting therefrom, and nothing more. *Hiden v. Jordan*, 28 Cal. 305; *Bryan v. Maume*, *Id.* 244; *Jones v. Block*, 30 Cal. 229; *McClory v. McClory*, 38 Cal. 575; *Sawyer v. Sargent*, 65 Cal. 259; *Hayne*, New Trials & App. § 242, p. 734. The opinion of the court below will in many cases save us labor, and we are always glad to have it, but it should be entirely separate from the finding of facts and conclusions of law.

The four remaining specifications of error will be considered together, and are as follows: (3) "The evidence shows that the defendant the Spokane & Palouse Railroad Company has acquired a right of way over said land, and constructed the road bed thereover, prior to the time when the plaintiff acquired any right therein." (4) "That the defendant's map was approved July 11, 1889, by the secretary of the interior, and the homestead entry of Wm. G. Daniel was not made until the 5th day of October, 1889, nor did the said Daniel sell the land in dispute to the plaintiff until September 3, 1890; therefore the said railroad company was prior in right." (5) "That the railroad line has already been built across the land in dispute prior to its purchase by Hamilton, the plaintiff, that he has no condemnable interest in the land." (6) "That upon the opinion of the court the facts as set out entitle the defendant to judgment."

The appellant contends that the evidence shows that the said Spokane & Palouse Railway Company acquired the right of way over said land on July 11, 1889, by reason of its having complied with an act of congress dated March 3, 1875; that on the 7th day of November, 1888, one James L. Wilkins filed declaratory statement No. 3,716, in the proper local land office, for said quarter section of land; that on the 5th day of October, A. D. 1889, said Wilkins relinquished the land (covered by his said filing) to the government of the United States; that on the 5th day of October, 1889, one William G. Daniel entered said land as a homestead, under and by virtue of the homestead laws of the United States, at the proper local office, claiming settlement October 4, 1889. To determine this contention, I refer to the evidence. The evidence shows that one James H. Day filed his declaratory statement No. 3,446, under the pre-emption laws of the United States, in the proper local land office, for a quarter section of land, which included the 2.28 acre tract, referred to in the complaint, and thereafter, on

Effect of pre-emption filing and homestead entry on grant of right of way.

the 5th day of November, 1888, relinquished the same to the United States; that on the 29th day of April, 1890, said William G. Daniel commuted his said homestead entry and made cash entry of the land covered thereby, and received the final certificate of purchase from the register of said United States land office therefor; that on the 3d day of September, 1890, the said William G. Daniel and Alice Daniel, his wife, for the consideration of \$100, conveyed by warranty deed the said 2.28 acres of land to the respondent; that the respondent is the owner of said 2.28 acre tract, and that, by reason of appellant having graded its road bed thereover, the respondent has sustained damage, provided that appellant had not acquired a right of way over said tract of land under said act of congress as aforesaid; that the appellant was a duly organized and existing railroad company or corporation, and that said company had complied with the terms and conditions of the said act of congress of March 3, 1875, in regard to acquiring a right of way through the public lands of the United States; that the profile map of the appellant's road through the said 2.28 acres of land (and across other lands) was approved by the secretary of the interior on the 11th day of July, 1889, and such approval noted on said plat, as required by section 4 of said act. The court below substantially found the facts as above stated, with the additional fact that respondent had sustained damages in the sum of \$250; and, as a conclusion of law deduced therefrom, found that the respondent was entitled to judgment for \$250 and costs of suit.

There is no dispute as to the main facts. The principal point in the case, then, is as to whether the conclusion of law deduced from the finding of facts is erroneous; in other words, is the respondent entitled to judgment on the facts found? The land in question was a part of what is known and designated as "unoffered public lands of the United States." That class of land is subject to entry under the pre-emption and homestead laws of the United States. It is also included in the act of congress above referred to, through which railroads may acquire rights of way under said act of congress. It will be observed that the land in controversy had been filed upon under the pre-emption laws of the United States, and prior to the approval of appellant's profile map, first by one James H. Day, and after his relinquishment by James L. Wilkins, who relinquished his said filing on the 5th day of October, 1889. The inchoate pre-emption rights of Day and Wilkins under said pre-emption filings were abandoned by such relinquishments.

There is no evidence showing that either of said pre-emp-

tion claimants had complied with the pre-emption law as to settlement, residence, improvement, and cultivation. The land covered by their said filings had not been disposed of by the government to either of them. It is not claimed that there was any privity of estate between both or either of said pre-emption claimants and William G. Daniel, (the grantor of respondent), and there was none. The case of *Bramwell v. Railroad Cos.*, 2 Dec. Dep. Int. 844, is decisive of that point. In that case one Thomas filed his declaratory statement, May 19, 1869, and relinquished the same March 29, 1871, on which last-named day Bramwell made homestead entry of the same tract. The defendant companies claimed the tract jointly under an act of congress dated May 6, 1870. The grant to the railroad companies took effect subsequent to the date of Thomas' filing, and prior to his relinquishment. That case is very similar to the one at bar. Acting Secretary Joslyn in that case (page 844) says: "I concur with you [the honorable commissioner] in your opinion, as it will be observed that the record fails to discover [disclose] any privity of estate between Thomas and Bramwell, whereby the latter's rights could be made to antedate the grant, or to take effect by relation as of the date of Thomas' initiation of claim to the premises. Moreover, it should be observed that Thomas' right was merely inchoate, he having relinquished without perfecting the same or doing anything to that end." The record in the case at bar discloses that Wilkins relinquished his pre-emption filing on October 5, 1889, and that respondent's grantor made his homestead entry for said land on said 5th day of October. No privity of estate is shown or existed between Wilkins and Daniel, whereby the latter's homestead right to said land would be made to antedate the grant of right of way to the appellant, or to take effect, by relation, as of the date of Wilkins' pre-emption filing. Wilkins' pre-emption claim was merely an inchoate or inceptive right, and he relinquished the same without perfecting his title to the said land. The patent from the United States to Daniel (the grantor of respondent) will take effect, by relation, as of the date of his homestead entry, to wit, October 5, 1889, whereas the grant to appellant was made July 11, 1889. The land in question was not disposed of by the government until after the grant of the right of way to appellant. Section 4 of said act provides that, after the approval of the plat, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

The respondent contends that Wilkins' said pre-emption filing reserved said land from the operation of said grant, and cites a number of authorities in support of such proposi-

tion. Upon that proposition the respondent cites *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 40 Am. & Eng. R. Cas. 426; also *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; also *Atchison, T. & S. F. R. Co. v. Pracht*, 30 Kan. 66, 12 Am. & Eng. R. Cas. 267; and *Fearns v. Atchison, T. & S. F. R. Co.*, 33 Kan. 275. These cases all arose under acts of congress granting lands to aid in the construction of railroads, and each of said acts contains a provision reserving from such grants all lands to which a pre-emption or homestead right had attached, and are not in point. Mr. Justice FIELD, in the case of *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426, 2 Am. & Eng. R. Cas. 510, very clearly draws the distinction between grants of land to aid in the construction of a railroad and a grant of a right of way, in the following language: "But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present, absolute grant, subject to no conditions, except those necessarily implied, such as that the road shall be constructed and used for the purpose designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them; on the contrary, their value would be greatly enhanced." "The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route." The sixth section of the act under which that case arose is very similar to the first section of the act of March 3, 1875. It grants the right of way through the "public lands" without reservation. The act of March 3, 1875, grants the right of way through "public lands," except as reserved in section 5 of said act, to wit: "All lands within the limits of any military park or Indian reservation, or other lands especially reserved from sale." In addition to the reservations mentioned in the act of March 3, 1875, the acts granting lands to aid in the construction of roads reserve all lands from the effect and operation of such grants "to which a homestead or pre-emption claim had attached." The case of *Union Pac. R. Co. v. Douglass Co.*, 31 Fed. Rep. 540, cited by appellant, is a case which arose under the act of congress of July 1, 1862, (12 St. U. S. 491,) granting the

right of way to the Union Pacific Railroad Company over public lands. The question presented was, did the grant of the right of way operate upon sections 16 and 36, the sections granted by the organic act of 1854 to the territory of Nebraska for school purposes? It will be observed that the grant to the railroad was later than the grant to the territory of Nebraska. Mr. Justice BREWER says, on page 540: "But the power of congress over lands of which the fee has not already passed and vested is unquestioned." "In the land grant made by this act, congress made specific exceptions of lands to which any pre-emption, homestead, or other claim had attached, while the grant to the right of way is absolute and without exception." In that case Mr. Justice BREWER also discusses the meaning of the term "public lands," referring to a quotation from the opinion in *Wilcox v. Jackson*, 13 Pet. (U. S.) 498, which authority is cited by respondent as an authority in this case. He says: "On the meaning of the term 'public lands,' the language, which is very broad, must be construed with reference to the facts of that case; and there it appeared that land had been reserved for military purposes, and it was held that a subsequent act for the sale of lands in that territory did not operate upon this particular reserved tract. This only shows that, when land has been once reserved, congress will not be presumed to have intended a disposition of it in any other way, unless the intent is clearly expressed; but that does not meet the question in this case, for the act of congress of July 1, 1862, does not purport to grant the fee, but only a right of way;" and cites with approval *St. Joseph & D. C. R. Co. v. Baldwin*, *supra*; also *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733. In the following authorities, the distinction between a land grant and a grant of a right of way is recognized and commented upon: *Western Pac. R. Co. v. Tevis*, 41 Cal. 492; *Doran v. Central Pac. R. Co.*, 24 Cal. 259; *U. S. v. Garretson*, 42 Fed. Rep. 22; *Turner v. Union*, 5 McLean, (U. S.) 344; *Northern Pac. R. Co. v. Meadows*, 46 Fed. Rep. 254; *Denver & R. G. R. Co. v. Alling*, 99 U. S. 475. In *Bybee v. Oregon & C. R. Co.*, 26 Fed. Rep. 589, 24 Am. & Eng. R. Cas. 127, Judge DEADY says: "The grant of a right of way is a separate and distinct matter from that of the lands to aid in the construction of the road. The reversion or forfeiture provided for in section 8 of the act of 1866 does not include the right of way, but is limited to the 'lands' remaining unpatented or unearned at the time of the failure. The grant of the right of way is without condition, except that which the law tacitly annexes to all such easements,—the liability to be lost or forfeited for non-user, ascertained and deter-

mined in a judicial proceeding instituted by the government for that purpose. But it is also a present absolute grant, and takes effect when the line of the road is located, from the date of the act, as against any intervening claim or settlement whatever." In the case at bar the grant took effect from the date of the approval of the plat, which was July 11, 1889. The act of March 3, 1875, grants the right of way through the public lands of the United States upon conditions. The only reservations therein are contained in section 5 of said act, as above stated. The inchoate pre-emption right of Wilkins, which did not ripen into title, does not come within either of the above reservations. Section 4 of said act declares that, after the approval of the profile map by the secretary of the interior, "all such lands over which such right of way shall pass shall be disposed of subject to such right of way." The government of the United States had not disposed of said land within the meaning of the term "disposed," as used in the fourth section of said act, prior to October 5, 1889, the date of Daniel's homestead entry. The patent to be issued to Daniel will, by relation, take effect as of the date of his homestead entry, and no earlier.

The judgment of the district court should be reversed, and judgment entered in favor of the appellant, dismissing this action, and for costs of suit; and it is so ordered.

MORGAN and HUSTON, JJ., concur.

**Land Grants to Railroads—Rights of Homestead and Pre-emption Claims.**—See *ante*, St. Paul & S. C. R. Co., *v.* Ward, and note, pp. 325, 331.

**Land Grant—Location of Mining Claims in Reserved Land.**—In Northern Pac. R. Co., *v.* Sanders (C. C. A.) 49 Fed. Rep. 129, it was held that act Cong. July 2, 1864, granting land to the Northern Pacific Railroad Company to aid in the construction of its road, which creates a reserve of the odd-numbered sections of lands "not mineral," within the limits defined, "which are free from pre-emption or other claims or rights," from the time of filing a plat of the general route in the general land office, does not prevent persons taking up mining claims in the reserved lands after the filing of such map, and before the definite location of the road; and it does not avail the railroad company that the lands so located under mining claims are in fact non-mineral lands. *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 29 Am. & Eng. R. Cas. 455, and *Denny v. Dodson*, 32 Fed. Rep. 899, distinguished. 47 Fed. Rep. 604, affirmed.

**State Taxation of Lands Granted by Congress.**—The grant of lands to the Northern Pacific Railroad Company, under Acts July 2, 1864, was a present grant, which attached to the specific sections as they became capable of identification by the definite location of the road; and upon a report by the government surveyors that the lands surveyed are non-mineral, such lands become subject to state taxation, although the land commissioner refuses to issue patents therefor until further satisfied that the lands are in fact non-mineral. *Northern Pac. R. Co. v. Wright* (C. C. D. Mont.) 51 Fed. Rep. 68.

## MORRIS

v.

## TOTTENHAM AND FOREST GATE R. CO.

(2 Ch. (1892) 47.)

**Power to take Temporary Possession of Land—Necessary Purpose—“Road”—Railroad.**—The authority given by section 32 of the Railways Clauses Consolidation Act 1845, to take temporary possession of land for the purpose of forming roads does not include taking for the purpose of forming a railroad. Land can only be so taken when the taking is necessary, and mere saving of expense does not constitute necessity.

THIS was a motion on the part of the plaintiffs for an interlocutory injunction in terms of the writ, viz., to restrain the defendants, the Tottenham and Forest Gate Railway Company, from proceeding on a notice to take temporary possession, under section 32 of the Railway Clauses Consolidation Act, 1845, of land of which the plaintiffs were lessees in possession. The notice was dated the 28th of December, 1891, and was to take temporary possession of the land in question “for the purpose of forming roads thereon to or from or by the side of the proposed railway during the construction of the railway.”

The defendants’ railway in course of construction crossed the main line of the Great Eastern Railway nearly at right angles, a short distance from the Leytonstone station. The plaintiff’s land adjoined the main line. The land comprised in the notice in question was intended to be used for the construction of a branch, in the form of a quadrant of a circle, to connect the main line with the new line, for the purpose of bringing materials from places of some distance away to be used in the construction of the new railway. A small part of it had been made, and a photograph in evidence showed that it was laid with sleepers and rails, exactly like those on the main line. The following is an extract from an affidavit filed on behalf of the defendants:—

“It is undoubtedly the intention of the company and their contractors to use such land for the purpose of making a temporary road thereon from the siding of the Great Eastern Railway’s aforesaid goods station to the railway which the company are constructing, and no doubt materials for the construction of such railway will be carried in wagons or trucks from the said siding to the land on which such railway is being constructed, and in all probability, as is almost

invariably the case when a railway is being constructed, rails will be laid on the road when formed for such wagons or trucks to run on, and in all probability the materials so brought on to the company's property on which the railway is being constructed will be utilized not only for the purposes of such railway so far as it is near the land comprised in the said notice, but also on other parts of the site of the company's intended railway lying towards Forest Gate."

*Cozens-Hardy, Q. C., and Dibdin* for the plaintiffs.

*S. Hall, Q. C., and R. J. Parker*, for the defendants.

NORTH, J. (after saying that he would treat the notice to take the land as sufficient in its terms, and that on the evidence the defendants proposed to make what was really a branch railroad on a land, continued):—  
 That being so, the owners of the land apply for an injunction and in my opinion they are entitled to restrain the trespass which the company propose to commit, if it be a trespass.

Power of  
company to  
enter on land.

The answer of the company is that they are justified in doing what they do under the act, and that really is the question. Does the 32nd section justify their entering upon and using the plaintiffs' land to build a railway upon for the purpose of connecting for temporary purposes the main line of the Great Eastern Railway with a new railway which crosses it at right angles?

Now, the 32nd section prescribes—to read it shortly—that the company may within the period for completing the line, without any payment or deposit, enter upon any lands within the limits—within which it is admitted that the present lands are—and to occupy the same so long as may be necessary for the construction or repair of that portion of the railway or of the accommodation works connected therewith hereinafter mentioned and to use the same for any of the following purposes.

Now, no one has suggested to me any reasonable construction of the phrase "that portion of the railway," and I do not know what it means. It does not refer to anything defined elsewhere in the act in any way.

The company having entered upon the land may occupy the said lands so long as may be necessary for the construction or repair of that portion of the railway or of the accommodation works connected therewith hereinafter mentioned, and use the same for any of the following purposes. Then comes this: "For the purpose of taking earth or soil by side cuttings therefrom." This branch is not intended for that. Then I will read the third next: "For the purpose of



obtaining materials therefrom for the construction or repair of the railway or such accommodation works as aforesaid." That seems to be very much *in pari materia* with the first. Both are as to taking materials from the land in question. Then I will go to the second: "For the purpose of depositing spoil thereon." That is not taking anything away from the land, but putting something upon it which is not there by nature; and as regards that, it appears to me if spoil is deposited thereon that is not a temporary deposit of spoil; it may be a permanent deposit. All those matters relate, therefore, to materials in connection with the land itself. It is either taking materials from the land or putting materials upon the land. Then we come to this: "For the purpose of forming roads thereon to or from or by the side of the railway." Now, although the previous words have dealt very fully with the taking of materials from and putting materials upon the land, there is no reference in terms to materials coming from any other place, except the land that is to be occupied; and the only question is whether those last words "forming roads" authorize the doing of what is proposed to get materials from or placed upon, not the land in question, but other land more or less contiguous. I do not think that such a railway as is proposed in the present case is a road within the meaning of the words as used here. That is my strong impression.

But there is a second point also, and upon that I am against the company. The decisions which have been given upon the act show that the 16th section and the 32nd section apply to cases in which what is proposed to be done is necessary for the purposes of the railway, not merely by reason of the language used in those two sections themselves, but on the ground of the general intentment of the act and the legislature in passing the act with reference to powers given to persons who propose to take away from owners temporarily or permanently the possession or enjoyment of land to which those owners are entitled; and, further than that, the act is to be construed as pointed out in *Simpson v. South Staffordshire Waterworks Co.*, 4 D. J. & S. 679. If there is any doubt with regard to the extent of the powers claimed under the act, it should be construed for the benefit of the landowner, and not in such a manner as to give to the company any power which is not most clearly and expressly defined in the statute. That being so, it is for the company to make out their case clearly, and to satisfy me on the reasonable construction of the act that their view of it is right. They have not satisfied me upon that point, having regard particularly to the cases that have been cited. Those cases seem

Necessary  
purpose.

to me to show that what is required for justifying the proceedings of the company is that the work is necessary for the construction of the railway ; and, without saying what is necessary, the decisions show that a mere saving of expense to the company, and *a fortiori* a mere saving of expense to the contractors for the company, is not a necessary purpose within the meaning of the act.

Then it is said that such a construction, although it may be essential and binding as to the 16th section, is not essential as to section 32. I think it was pointed out in *Fenwick v. East London R. Co.*, Law Rep. 20 Eq. 544, (which was a case relating to the 32nd section, and not to the 16th section ; but I do not think that there is any distinction between the two) that the decision was based rather upon the general intendment of the act than upon the particular wording of the section ; a purpose which covers all the sections contained in it, except so far as there is anything in the act to distinguish them.

Then it is said that the phrases used in both the 31st section and the 35th section of the act show that, with regard to taking under the 30th section or the 32nd section of the act, it is not essential that the works should be necessary ; it is sufficient that they should be convenient. The argument upon those sections does not convince me. The question whether it is more fitting that one piece of land or another should be taken for a purpose for which the company are authorized to use either of them may well arise as between two different pieces of land and their respective owners, while it is strictly and essentially necessary for the purposes of the company that one or other of those two pieces of land should be so used by them. The 31st and 35th sections will apply to such case, and they have their full meaning given to them by applying them to cases in which it is necessary for the company to get the use of the land from one person or another without its being essential to get it from one rather than the other of them, although the question may still be open whether it is more fit as between the two that they should take from one or the other.

Under these circumstances, I come to the conclusion as regards the 32nd section that the taking of this land is not shown to be necessary, having regard to the decisions of the act.

That being so, I must grant the injunction.

## TEXAS WESTERN R. CO.

v.

WILSON.

*(Texas Supreme Court, Jan. 26, 1892.)*

**Right of Way—Acquisition of Title by Adverse Possession.**—A railroad company cannot acquire title to the fee of land by adverse possession where it enters on the land as a trespasser, constructing and operating its road thereon, since such possession and claim are only of an easement for its right of way.

**Easement by Prescription—Continuous Occupancy—Sufficiency of Proof.**—The burden of proof on a railroad company, claiming an easement by prescription in land occupied by it as a right of way, is not sustained by proof of its original and present occupancy, without proof that such occupancy has been continuous during the entire period necessary to confer title.

**Intent to Prescribe for an Easement—Sufficiency of Testimony to Show.**—The intent of a railroad company to prescribe for an easement for a right of way over lands under a claim of right antagonistic to the lawful owner thereof, is not established by testimony of one of the directors that possession was taken during the owner's absence, and that the company intended to pay for the land when called on by the owner, there being no proof of any demand or refusal of possession or compensation.

COMMISSIONERS' decision. Section A. Appeal from Harris District Court. Trespass to try title. Judgment for plaintiff, and defendant appeals.

*George H. Breaker*, for appellant.

*Wm. H. Crank*, for appellee.

MARR, J.—This suit was brought upon the 2d day of September, 1886, in trespass to try title to recover of the defendant the possession of a 10-acre lot of land in the city of Houston, and the appellee, as plaintiff below, recovered that character of judgment in the district court. The appellant, among other defenses, pleaded the statute of limitation of 10 years, and also an easement acquired by prescription to so much of the land in controversy as constituted its right of way. To the remainder of the land it entered a formal disclaimer.

There is but one assignment of error in the brief of the appellant, and that is to the effect that the court erred in rendering judgment for the plaintiff for the possession of the entire tract of land without establishing its right of way through the land. The appellant was a naked trespasser upon the land. It never sought to condemn the land in any

of the modes prescribed by law in order to obtain the right of way, though it might have done this by a cross bill at the trial below, under the act of 1889. Act 21st Leg. p. 18. It has at no time made any compensation to the owner, as required by the constitution and laws in such cases. It must be held, therefore, that the appellant has acquired no right or title to the land in dispute, and, as a consequence, to a right of way therein, under the statute of limitation of 10 years; the possession and claim not being of that character as will perfect title to the land. This view of the law was expressly announced by the supreme court upon a similar state of facts in the case of *Hays v. Texas & P. R. Co.*, 62 Tex. 397, 23 Am. & Eng. R. Cas. 102, and we need only to refer to that decision as conclusive of the question. In that case the correct practice in suits of the character of the present action was indicated in the following language: "A party in possession of another's land, claiming an easement, is a trespasser if his claim is without foundation. If, in a suit by the owner of the soil, the plaintiff shows title to the land, and the defendant to the easement, the plaintiff recovers, subject to the right of the defendant to enjoy the easement. If the defendant shows no title of this character, the owner of the land dispossesses him altogether."

No title by  
adverse pos-  
session.

It remains to decide whether the appellant has acquired an easement in the land by prescription, or whether its "claim is without foundation." This is the controlling question in the case, and is really the only one presented by the assignment of error, strictly construed. As there are no conclusions of law and fact in the record, we are not advised of the reasons upon which the district court predicated its decision. If, however, its judgment can be sustained upon any reasonable view of the case as presented in the record, it is our duty to do so, and put an end to the litigation. The evidence is indefinite, and not very satisfactory, as to the exact time when the appellant entered upon the premises in controversy and constructed its roadbed; and in this particular the appellant is possessed of "the narrowest of margins." It may be that the court below for this reason held that the entry was not shown to have been made 10 years before the institution of the suit. But for the purpose of this case, and in the view we take of the effect of the evidence, we will conclude that the proof is sufficient to establish that fact. We may concede, also, that a railway company, as a mere trespasser, may, under the law, acquire an easement or right of way by prescription, though we are not required, under our estimate of the facts

Easement by  
prescription.

in evidence, to make an authoritative ruling upon that point in the present instance. There are authorities to that effect. *Organ v. Memphis & L. R. Co.*, 51 Ark. 235, 39 Am. & Eng. R. Cas. 75; *Sherlock v. Louisville N. A. & C. R. Co.*, 115 Ind. 22.

The doctrine is well established that the burden of proof is upon the party claiming an easement in the land of another, without any contract or express grant thereto, to establish all of the necessary facts from which the right may be presumed in his favor. He must clearly show open and peaceable possession for the full period required under the statute to preclude a recovery of land against one having no other title, and with at least the implied acquiescence of the owner, and that during all of such time the use and enjoyment of the right has been exclusive, uninterrupted, and continuous, and under a claim of right adversely to the owner of the fee. If there is a failure to establish any of these essential elements by a preponderance of evidence, the claim to the easement cannot be maintained. *Haas v. Chousard*, 17 Tex. 589; *Rhodes v. Whitehead*, 27 Tex. 311; *Midland R. Co. v. Smith*, 125 Ind. 509, 44 Am. & Eng. R. Cas. 222; *Washb. Real Prop.* pp. 318, 321, 325, §§ 17, 20, 23; *Washb. Easem.* pp. 131-142; 3 Kent, Comm. p. 444; *Ward v. Warren*, 82 N. Y. 269.

In this case we cannot hold that the judgment of the court below is without evidence to support it, (as must be done to authorize a reversal,) or is given against the preponderance of the testimony. It was shown, as we have conceded, that some time during the year 1875 or 1876 the appellant entered upon the land in dispute, and constructed its roadbed and railway track, and that "in the year 1876 the first 10 miles of the road were built and in operation, as testified to by one of the witnesses. The railway is a narrow gauge road, and its track and roadbed is about 10 feet wide. The right of way was, as is claimed, 50 feet in width, but has never been fenced nor occupied, except to the extent of the roadbed. It was admitted that "the defendant was at the time of the filing of this suit, and is now, in the possession of the premises sued for." The premises sued for are the entire 10 acres of land. The petition alleges the entry in the year 1884. It was also proved by the defendant below that "no change was ever made in the line of the roadbed as now laid; that the road has continued in its present place until the present time, and that the track has never been removed since it was laid." This is the full extent of the evidence as to the user, and we think that it is clearly insufficient, considering "the nature of the easement," to show a continuous exercise and enjoyment of the right claimed for

the requisite period of time. Mere possession of the land at certain times does not show an assertion and enjoyment of the easement. For aught that appears, no trains may have been run over the road, or any other use made of the track or right of way, by the appellant after the year 1876. We cannot presume these facts, but as we have already stated, it devolved upon the defendant to prove these by a preponderance of the testimony. *Cooper v. Smith*, 9 Serg. & R. (Pa.) 33; *Emery v. Raleigh & G. R. Co.*, 102 N. Car. 209, 37 Am. & Eng. R. Cas. 253; Washb. Easem. p. 142, § 39.

We will next in order inquire whether the claim to and the exercise of the right (conceding it to have been exercised) was adverse to the owner of the land. The testimony of John T. Brady, one of the directors, affords the only proof bearing immediately upon the point. That part of his evidence to which we refer is as follows: That John Koops (the owner of the land) at the time "lived in Houston, but was away from the city," he thinks, "when the road was built. We went on the land, and have never paid for the right of way. We expected and intended to pay for it when called upon at any time by the owner." There is no proof of any demand for possession or compensation, or a refusal thereof by the defendant, prior to the institution of this suit. We think that these facts do not show an intent to prescribe for a use and enjoyment of the easement under a claim of right in the defendant, independent of any antagonistic to the owner of the land. The inference might be drawn by the court below that the inception and user of the right of way was in subordination to the owner, and in recognition of his superior rights in the premises, and, if so, we cannot hold, under well settled rules of law, that the conclusion was unwarranted by the facts proved. A single act of acknowledgment by the defendant of the owner's title is fatal to the right. Washb. Real Prop. p. 322; Washb. Easem. p. 132, §§ 27, 28; *Colvin v. Burnet*, 17 Wend. (N. Y.) 564; *Chance v. Branch*, 58 Tex. 490; *Thurmond v. Trammell*, 28 Tex. 380, 381; *Mhoon v. Cain*, 77 Tex. 316, and cases cited. In view of what we have said upon the whole case, we have, in fine, reached the conclusion that the evidence is not of that satisfactory character which would have justified, much less required, the court to presume the grant from the owner of the soil of the right of way. *Taylor v. Watkins*, 26 Tex. 688.

Without such presumption, an easement dependent entirely upon prescription cannot exist, and, consequently, we think that the judgment ought to be affirmed.

PER CURIAM. Affirmed, as per opinion of commission of appeals.

**Acquisition by Railroad Company of Title by Adverse Possession.**—See *American Bank Note Co. v. N. Y. Elevated R. Co.* (N. Y.) 50 Am. & Eng. R. Cas. 292; *Miner v. New York, C. & H. R. Co.* (N. Y.) 47 *Id.* 212, note 50 *Id.* 211; *Erie & N. R. Co. v. Rosseau* (Ont.) 46 *Id.* 539; *Chicago & N. W. R. Co. v. Galt* (Ill.) 44 *Id.* 43, and cases cited in note 50.

**Right of Way Across Railroad by Adverse User—Admission of Deed in Evidence.**—In *Hoyle v. New York & N. E. R. Co.*, (Conn. Jan. 7, 1891) 22 Atl. Rep. 446, it appeared that a land owner conveyed a strip of land through his land to a railroad company; the deed provided that the company should permit the grantor to use the crossings "now made on said lands." An action was brought for obstructing the right of way, which the grantor claimed wholly on adverse user, and it was held that it was error to admit the deed in evidence to prove a right of way by adverse user, and the recognition of such right on the part of the grantee by accepting it.

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## BLAKELY

v.

CHICAGO, KANSAS & NEBRASKA R. CO.

(*Nebraska Supreme Court, March 23, 1892.*)

**Right of Way—Grant to Railroad—Additional Servitude—Compensation.**—A land owner executed a deed to certain lands to the R. V. Ry. Co. for 100 feet in width for right of way to said railway company, "its successors and assigns, for right of way, and for operating its railroad only." An assignee of the original grantee conveyed to another railway company 42½ feet of its right of way across the plaintiff's land, thus making two roads upon such right of way. *Held*, that the second railway was an additional burden on the land, and plaintiff is entitled to recover.

ERROR to Gage District Court.

Ejectment. Judgment for defendant. Plaintiff brings error.

*Griggs & Rinaker* for plaintiff in error.

*Stephen S. Brown* and *Hazlett & Bates*, for defendant in error.

MAXWELL, C. J.—In 1885, the plaintiff and her husband made a conveyance to the Republican Valley Railroad Company as follows: "Know all men by these presents, that Maggie C. Blakely, Nathan Blakely, of the county of Gage and state of Nebraska, in consideration of the sum of \$1,900.00 in hand paid, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey unto the Republican Valley Railroad Company, its successors and assigns, for right of way, and for operating its railroad only, the following described real estate, situate in Gage county, state of Nebraska, to wit: A strip of land 100 feet wide, it being 50 feet on each side of the center line

of the railroad company as located upon the northwest quarter of the southeast quarter, and the southwest quarter of the northeast quarter, and southeast quarter of the northwest quarter, of section No. 3, in township No. 3, range No. 6 east of the 6th P. M.; to have and to hold the same unto the said railroad company, its successors and assigns. In testimony whereof we hereunto set our hands and seal this 2nd day of July, A. D. 1885. MAGGIE C. BLAKELY. NATHAN BLAKELY. In presence of R. S. BIBB."

This deed was duly acknowledged. The cause was submitted to the court upon an agreed statement of facts, which covers many pages, and with undue particularity sets out the various steps taken in the organization of the several companies. It will not, therefore, be copied, as no question arises upon most of its statements. It is admitted that the defendant in error has conveyed 42 1-2 feet of its right of way derived from the plaintiffs under said deed to the Chicago, Kansas & Nebraska Railway Company. The court below found the issues in favor of the defendant and dismissed the action.

It will be observed that the conveyance is "for right of way and for operating its railroad only." The Chicago, Burlington & Quincy Railroad Company, is the successor of the Republican Valley Railroad Company. It is claimed on behalf of the defendant in error that, as the plaintiff in error conveyed the right of way by deed, therefore the title passed to the railway company for all purposes, and it may convey to whom it pleases. Section 81, chap. 16, Comp. St., is as follows: "Such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line, and may take, hold, and appropriate so much real estate as may be necessary for the location, construction, and convenient use of its road, including all necessary grounds for stations, buildings, work shops, depots, machine shops, switches, side tracks, turn-tables, and water stations; all materials for the construction and repair of said road and its appurtenances; and a right of way over adjacent lands sufficient to enable such company to construct and repair its road; and a right of making proper drains: provided, that the lands held, taken, and appropriated otherwise than by the consent of the owner shall not exceed 200 feet in width, except for wood and water stations and depot grounds, unless where greater width is necessary for excavations, embankments, or depositing waste earth: provided, further, that no appropriation of private property for the use of any corporation provided for in this subdivision shall be made until full

Second railroad an additional servitude.



compensation therefor be first made or secured to the owners thereof." Section 1241 of the Code of Iowa provides "that a railway company may take and hold, under the provision of this chapter, so much real estate as may be necessary for the location, construction, and convenient use of its railway, and may also take, remove, and use for the construction and repair of said railway and its appurtenances any earth, gravel, stone, timber, or other materials on or from the land so taken."

In *Vermilya v. Chicago, M. & St. P. R. Co.*, 66 Iowa 606, 23 Am. & Eng. R. Cas. 108, a quit claim deed for right of way contained this provision: "For all purposes connected with the construction, use, and occupation of said railroad and right of way;" and it was held that the company could not take sand from such right of way for the purpose of building a roundhouse without compensating the owner of the land therefor. The case seems to have been carefully considered, and is as applicable in this state as in Iowa. *Fort Worth & R. G. R. Co. v. Jennings*, 76 Tex. 373; *Barlow v. Chicago, R. I. & P. R. Co.*, 29 Iowa, 279; *Noll v. Dubuque, B. & M. R. Co.*, 32 Iowa, 71.

In *Platt v. Pennsylvania Co.*, 43 Ohio St. 228, a railway company sold part of its right of way which it had condemned to another railway company, and it was held by the supreme court of Ohio to be an abandonment of the part conveyed. The land was conveyed by the plaintiffs only for right of way and operating the road.

There is a plain limitation in the grant to these purposes. The grant no doubt includes the original grantors, successors, and assigns, because in such case only the name of the road to which the conveyance was made is changed, although it may have passed into other hands than its builders. A party may be willing to permit one railway to cross his land, while he might not give his consent to two or more being constructed across the same. There are many reasons for this,—the increased danger from accidents by fire, or other accidents which need not to be enumerated. This principle was recognized in *Donisthorpe v. Fremont, E. & M. V. R. Co.*, 30 Neb. 142, 43 Am. & Eng. R. Cas. 583, where a conveyance for right of way was obtained upon the assurance that the main line only of the railway would be constructed on the right of way so assigned, whereas afterwards three side tracks were laid past the house of the grantor, thereby greatly diminishing the value of the property below what it would have been had the main line alone been constructed there; and it was held that such difference could be recovered. In the case at bar there is a limitation in the grant to a particular pur-

pose, and that does not contemplate a transfer to another company of a part of its right of way. Such conveyance is unauthorized under the deed from the plaintiff. Whether such conveyance could be made in case the deed had been absolute in form does not arise in this case, and therefore will not be determined; but upon the facts set forth in the stipulation the plaintiffs are entitled to judgment for the strip of land in controversy.

The judgment of the district court is reversed, and the cause remanded for further proceedings. The other judges concur.

**Right of Way—Second Railroad as Additional Servitude on Land.**—See *Ft. Worth & R. G. R. Co. v. Jennings* (Tex.) 46 Am. & Eng. R. Cas. 574.

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### ELYTON LAND CO.

v.

### SOUTH & NORTH ALABAMA R. CO.

(*Alabama Supreme Court, Nov. 24, 1891.*)

**Right of Way—Misuser—Erection of Freight Depots.**—Land acquired by a railroad company for a right of way may be used by it in any manner which contributes to the efficient operation of its road, and which does not interfere with the property rights of adjacent land owners. In this case the use of a right of way for the erection of a freight depot was held not to be a misuser.

**Ejectment—Action by Trustees of Land Held for Right of Way.**—A land company in which the fee of certain land is held in trust for a perpetual right of way for all railroad companies doing business within a certain city cannot maintain ejectment against one of the railroad companies occupying such right of way, based on a misuser of its right of way, since the defendants, and other railroads, were entitled to possess and use the land, and the plaintiff has not the possession essential to the maintenance of the action.

**Estoppel—Res Judicata.**—In this action the plaintiff land company is held estopped from setting up a claim inconsistent with a decree obtained against the same parties and recitals in a deed executed by it.

**APPEAL** from Jefferson Circuit Court.

Ejectment to recover a strip of land used by defendant as a right of way in the city of Birmingham, with other lands.

*Alex. T. London*, for appellant.

*Hewitt, Walker & Porter*, for appellee.

**WALKER, J.**—The land involved in this suit is included in the description of the strips of land lying on either side of the right of way of the Alabama & Chattanooga Railroad Company, which, by the terms of the contract of April 21, 1871, between the Elyton Land Company, the Alabama & Chattanooga Railroad Company, and the

Case stated.

South & North Alabama Railroad Company, were to be held by the Elyton Land Company forever, as a perpetual right of way for all railroad companies doing business in and through the city of Birmingham. That contract was before this court in the case of the Alabama G. S. R. Co. v. South & N. A. R. Co., 84 Ala. 570, and the extent of the right conferred by its terms upon the South & North Alabama Railroad Company in the right of way of the Alabama & Chattanooga Railroad Company was there determined. In March, 1881, the Elyton Land Company filed its bill in chancery against the South & North Alabama Railroad Company and the Alabama Great Southern Railroad Company, alleging, in substance, the existence of the contract above referred to, the non-compliance by the Alabama Great Southern Railroad Company as the successor of the Alabama & Chattanooga Railroad Company, with the conditions of said agreement to be performed by the former of these two companies, and the partial compliance by the South & North Alabama Railroad Company with the conditions to be performed by it under said contract, so as to entitle that company to a portion of the lands which it was to receive under the contract. The complainant in that bill sought thereby to have revoked and declared forfeited the benefits stipulated for by said agreement in favor of the Alabama Great Southern Railroad Company, and of all other railroad companies, except the South & North Alabama Railroad Company. Decrees *pro confesso* were entered against both the defendants. A final decree was rendered, in which it was recited that "it appears from the allegations of the bill and the admissions of complainant in open court that the South & North Alabama Railroad Company has complied substantially with the terms and conditions of the agreement of April 21, 1871, and has agreed with the complainant on the boundaries of the lots or parcels of land to which the South & North Alabama Railroad Company is entitled under said agreement, being part and parcel of the lands therein described; and as to the lands so designated and set apart to the South & North Alabama Railroad Company, and as to all other rights acquired for its use, by said South & North Alabama Railroad Company under said agreement, the said agreement remains unaffected by this decree." It was decreed that said agreement be revoked, annulled, and declared void and of no effect as to the Alabama & Chattanooga Railroad Company and its successor, the Alabama Great Southern Railroad Company, and as to all other railroad companies and all other persons; but the decree expressly reserved the right of the South & North Alabama Railroad Company for its own use under said agreement. The conclusive effect of

this decree upon the rights of the Alabama Great Southern Railroad Company was fully recognized in the case above cited. The result of the decree was to exclude all claim by that company upon any lands of the Elyton Land Company covered by the terms of the contract in question, and to leave the interest of the South & North Alabama Railroad Company in the strip of land involved in this suit undiminished, and, indeed, augmented, certainly to the extent of the exclusion of the Alabama Great Southern Railroad Company from participation in the benefits of the contract. The decree just referred to was followed by a deed, executed in April, 1882, whereby the Elyton Land Company conveyed to the South & North Alabama Railroad Company certain lands, which were accepted by the latter company as the residue of the lands to which it was entitled under the contract of April 21, 1871. It was again recited in this deed that the Elyton Land Company claimed that the Alabama & Chattanooga Railroad Company, and all other railroad companies, except the South & North Alabama Railroad Company, had failed to comply with the terms and conditions of said original contract or agreement, and that said agreement was revoked and annulled as to all other companies or persons, except the South & North Alabama Railroad Company. It was expressly stipulated in that deed that the right of the grantee therein, acquired by said original agreement, to the strip of land 35 feet wide, a portion of which is involved in this suit, should remain in full force and effect, but that the right of way over said strip was abrogated as to all other railroad companies.

It is contended for the appellant that the agreement of April 21, 1871, together with the maps of its property made and published at that time, effected a dedication of the strips of land, a portion of which is involved in this suit, for the purposes stated in the agreement, and that this dedication was irrevocable, and could not be affected by the decree and the deed of 1882, above referred to. It is further contended that the erection of the depot on the strip in controversy is a misuser and a diversion of it from the purposes to which it was devoted by the dedication, which entitle the plaintiff to maintain ejectment for the recovery of the property.

The consideration that railroads are devoted to public uses affords the justification for the exercise of the power of eminent domain for the acquisition of private property for railroad purposes. But the land held by a railroad company for the purposes of its enterprise, whether acquired by condemnation proceedings or by purchase from the owners, is, so far as the right of property is concerned, private property. The

Private  
ownership of  
land by rail-  
road.

incidents of private ownership attach to it. The title is in no manner vested in the public or in any part of the public as such. The title of the railroad company is as exclusive as that of any sole grantee in a conveyance of land. It must use the property for the public purposes for which it was acquired under public authority. Though the property must be so used, still the ownership is private, and the public do not share in such ownership. The public are entitled to use the property, but they use it as the property of the company, and the company is entitled to compensation for its use. The law secures to the company the exclusive possession and dominion of the property, and only requires that it be devoted to the purposes of public use and convenience, to subserve which its acquisition was authorized. Land set apart for a railroad right of way, if accepted by the railroad company, is taken as the company's private property, and for its individual profit, though such company, by taking the property, charges itself with a public duty as to the use to which the property is to be devoted. The acceptance by the company is in its own behalf, and cannot properly be said to be in behalf of the public. A dedication is "an appropriation of land to some public use made by the owner of the fee, and accepted for such use by or on behalf of the public." The public is treated as the grantee, and the gift inures immediately to the public. 5 Am. & Eng. Enc. Law, 395, 399; Steele v. Sullivan, 70 Ala. 589. Dedication is not a mode of conferring a private property right in land. The only cases, not controlled by special statutory provisions on the subject, in which we have found the donation of land for railroad purposes spoken of as a dedication, involved only the assertion of a claim to the property in question by the railroad company itself; and in such cases the claim was either disallowed or was rested, not upon a common law dedication, but upon an adverse possession by the railroad company, or upon a state of facts raising an estoppel *in pais* against the holder of the legal title, which would have precluded him from asserting his title against any one who had occupied and improved the land with his knowledge and consent, under similar circumstances. Morgan v. Chicago & A. R. Co., 96 U. S. 716; Texas & N. O. R. Co. v. Sutor, 56 Tex. 496; 11 Am. & Eng. R. Cas. 506; Daniels v. Chicago & N. W. R. Co., 35 Iowa, 130; Forney v. Calhoun Co., 86 Ala. 463. It seems that when the act to be relied upon as the acceptance of a proposed appropriation of property is to be done, not by the public or in behalf of the public, but by an individual or by a private corporation, intending to take the

Land dedica-  
ted for rail-  
road uses.

property in its own behalf for use in a business enterprise to be prosecuted for its own profit, and the property is to be acquired as private property and for private gain, so that the public are not to share in the ownership or in the benefits of ownership, but the new private proprietor, by taking the property for the purposes in view, only charges itself with the duty of using the property for public purposes on receiving compensation for such use, then such appropriation of the property, to be binding upon the holder of the legal title, must be effected by his contract, grant, or conveyance, unless he has precluded himself from asserting his title as the result of a state of facts which would have a like effect against him in favor of a purely private party; and that it does not follow that such an appropriation is effected because the act of the proprietor would have amounted to a common law dedication if the gift had inured immediately to the public, and a private ownership for private profit had not intervened. It seems that a railroad company cannot hold its road, rights of way, depot grounds, or other property against the former proprietor thereof, unless its alleged interest therein has been secured to it in one of the modes provided by law for the vesting of private property rights in private parties. In the cases found by us in which the claim of a railroad company to such property has been rested solely upon a state of facts which would have amounted to a dedication if the appropriation had been for a public use, such claim has not been allowed; and the rejection thereof has been put upon the ground that such an interest in property could not be conferred upon a private party by what is known to the law as a dedication. *Watson v. Chicago, M. & St. P. R. Co.*, 46 Minn. 321; 46 Am. & Eng. R. Cas. 543, a decision by the supreme court of Minnesota; *Todd v. Pittsburgh, Ft. W. & C. R. Co.*, 19 Ohio St. 514.

But, even if it be conceded that the contract of April 21, 1871, if standing alone, should be given effect as an irrevocable dedication of the property in question as a perpetual right of way for all railroad companies doing business in and through the city of Birmingham, and that other railroad companies could claim the benefit of that dedication, and would be entitled to prevent the appellee from appropriating the property to a purpose inconsistent with its use as a common right of way, yet the Elyton Land Company is not now in a position to assert such claim against the South & North Alabama Railroad Company. In the first place, it plainly appears that the appellant obtained the decree on the bill in chancery above referred to by representing that the appropria-

Plaintiff  
estopped to  
set up claim.

tion of lands, including that involved in this suit, which was provided for by the contract of April 21, 1871, was conditional and revocable, and the adjudication that such was the effect of that contract was necessarily involved in the decree then made. Furthermore, the deed of April 28, 1882, was, in effect, a final settlement and adjustment between the parties to this suit of their respective rights under the contract of April 21, 1871. It plainly appears from the recitals contained in that deed that the application thereby formally admitted that the claim of all other railroad companies to participate in the use of the strip of land, a portion of which is involved in this suit, had been duly and rightfully abrogated, and that the appellee's right to the exclusive use of that land for the purpose to which it was devoted by the original contract was fully recognized. The recital in that deed of the reservation of the appellee's right in said strip, and of the forfeiture of the claims of all other railroad companies thereto, was a particular recital of material facts which entered into the consideration moving to the appellee for the covenants and releases then made by it. The appellant, having obtained the decree above referred to by representing the instrument upon which it now relies as having an operation wholly different from that now sought to be imputed to it, and having, in its subsequent deed, solemnly admitted as a material fact that the appellee alone is entitled to use the land in dispute as a right of way, is not estopped from setting up a claim inconsistent with such representation and admission. The proceedings in the chancery cause, and the recitals in the deed referred to, show solemn admissions by the appellant that the land in dispute was not irrevocably dedicated, as is now claimed, and the appellant is bound by those admissions, certainly so far as concerns its present claim against the appellee. *Pratt v. Nixon*, 91 Ala. 192; *Jones v. Morris*, 61 Ala. 518; *Tait v. Frow*, 8 Ala. 543; *Brown v. Hamil*, 76 Ala. 506; *Caldwell v. Smith*, 77 Ala. 157; *Hill v. Huckabee*, 70 Ala. 183; *Bigelow*, *Estop.* (5th Ed.) 366 *et seq.*; 7 Am. & Eng. Enc. Law, 7.

The extent of the interest acquired by the appellee in the land in dispute is to use it as a right of way. The appellant has not deprived itself of the right to confine the appellee to this particular use of the property, though it cannot longer claim that other railroad companies are entitled to share in such use. The claim now made is that the erection of a freight depot and other structures on the strip is a diversion of the property from the purpose to which it was appropriated. In the interpretation of an agreement, regard is to be had to the

Use of property—Erection of freight depot.

situation of the contracting parties at the time it was made, the occasion which gave rise to it, and the obvious design intended to be accomplished. *Tennessee & C. R. Co. v. East Alabama R. Co.*, 73 Ala. 444. For reasons already stated, the appellant cannot now deny that the appropriation of the property for the particular use mentioned was conditional, and that the right to participate in the use was forfeitable by any railroad company which should fail within a reasonable time to comply with the conditions imposed. According this meaning to the contract, and it is plain that the contingency of only one railroad company becoming entitled to the benefits offered by the contract was within the purview of its terms. The appellant has admitted by his deed that such contingency has happened; that all railroad companies other than the appellee have forfeited all claims under the contract to the use of the strip in dispute; and that the right to use it for the stipulated purpose is vested in the appellee alone. The parties are to be treated as having contemplated the possibility of the appellee acquiring the exclusive use of the strip as a right of way for its railroad alone.

It is to be observed that another provision of the same contract secured to the appellee the perpetual and free use of the right of way, 100 feet wide, of the Alabama & Chattanooga Railroad Company, (*Alabama G. S. R. Co. v. South & N. A. R. Co.*, 84 Ala. 570), so that the result of the appellee's compliance with the terms of the contract was to secure to it one right of way to be enjoyed by it in common with one or more other railroad companies, and also an exclusive right of way in another strip. In view of the fact that the use of the right of way of the Alabama & Chattanooga Railroad Company was secured to the appellee, the question to be determined is, did the appellant in stipulating for an additional right of way, which might become vested in the appellee exclusively, intend, in the event of such right so becoming exclusive, that the strip so appropriated should not be occupied by depots or other buildings adapted to railroad purposes, but should remain open so that tracks could be run over it? Such a meaning cannot be imputed to the contract, unless a railroad right of way is an interest of such limited scope that the land included therein must be devoted by the railroad company exclusively to a track or tracks over which trains may pass. It is a matter of common knowledge that the railroad business involves the use, not only of cars and tracks, but of buildings and structures of various kinds. It was contemplated that the strip of land in dispute in this case should be used as a right of way in a



city. The place was expected to be the scene for the transaction of many phases of the business different from, but incident to, the mere act of carrying persons or things. It was to be the place for receiving, delivering, storing, and transshipping freight. In such places it is frequently necessary for the convenient transaction of a railroad business to have platforms, warehouses, lumber yards, elevators, cattle pens, engine houses, car sheds, depots, repair shops, and other like facilities continuous to the tracks. The space which is commonly called the railroad right of way is, in populous localities, generally found dotted with structures, other than the tracks, which are necessary or convenient for the transaction of the business of a common carrier; and we think that the erection of such structures is to be regarded as within the contemplation of the parties to a contract which stipulates for the use of land in such a locality as a railroad right of way, unless the contrary appears from the terms of the contract. Ordinarily, the right of way of a railroad company is its exclusive property, and the company is entitled to its free and unobstructed use. *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 37 Am. & Eng. R. Cas. 308. The company is entitled to an absolute and exclusive possession, so far as to secure fully every purpose for which the railroad is made and used. *Tennessee & C. R. Co. v. East Alabama R. Co.*, 75 Ala. 524. The question is, what are the uses to which the right of way may be devoted? The Western Railroad Corporation was authorized by its charter to lay out its road, not exceeding five rods wide, through the whole length, and to acquire such strip by condemnation proceedings. In reference to the rights of the company within this area, SHAW, C. J., delivering the opinion of the supreme court of Massachusetts, said: "To the extent of five rods, it appears to us, the legislature intended that the franchise of this corporation should extend, for any and all purposes incident to the object of its creation. It was contended in argument that their franchise for public purposes extended only to the use of this strip of land as a way, and that if they had occasion for buildings and store houses, as incident to their operations as carriers of persons and merchandise, they were to be regarded in their latter capacity as carrying on a distinct business, for their own profit, and therefore that such buildings were not to come under the same franchise. But no such limitation is contained in the act of incorporation, and none such results from the nature of its provisions. The establishment of the rail track, and the maintenance of engines and cars, for the transportation of persons and goods, are all combined together, as one public object to be attained, and the privi-

leges incident to the other. No doubt in practice, the main use of the strip of land of five rods in width, in the greater part of its extent, will be for sustaining the track for the trains to pass over. But such restriction of its use is not found in the act, and therefore, when the corporation have occasion to use any part of such strip of five rods for any of the purposes incident to their creation, it is within their franchise." And, under the law of that state exempting public works from taxation, it was decided, in that case "that this railroad corporation is not liable to taxation for the land, of the width of five rods, located for the road, nor for any buildings or structures erected thereon, so that they be reasonably incident to the support of the railroad, or to its proper or convenient use for the carriage of passengers and the transportation of commodities; and that this includes engine and car houses, depots for the accommodation of passengers, and warehouses for the convenient reception, preservation, and delivery of merchandise, and all goods and articles carried on the road." *Inhabitants of Worcester v. Western R. Corp.*, 4 Metc. (Mass.) 564. That court has, in later cases, continued to recognize the right of a railroad company to occupy, with buildings or other structures, the land acquired for its railroad, so long as the mode of occupation is necessary or proper for the convenient exercise of the privileges and the performance of the functions defined by its charter. *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1; *Boston Gas Light Co. v. Old Colony & N. R. Co.*, 14 Allen, (Mass.) 444; *Brainard v. Clapp*, 10 Cush. (Mass.) 6; *Peirce v. Boston & L. R. Co.*, 141 Mass. 481; 27 Am. & Eng. R. Cas. 359.

In *Illinois Cent. R. Co. v. Wathen*, 17 Ill. App. 582, it was held that on land granted for "railroad and depot purposes," the company could permit the erection and use by private parties, without the payment of rent, of elevators, corn cribs, lumber yards, and lime houses which facilitated the business of the company in the receipt, transportation, and discharge of freight. In *Western Union Telegraph Co. v. Rich*, 19 Kan. 517, it was held that a railroad company may, for its own use in operating its road, construct a telegraph line over and along its right of way, and that by such use of the property it did not subject itself to an additional claim of the original land owner for compensation. The opinion of the court was delivered by Judge BREWER, now an associate justice of the supreme court of the United States. In the course of the opinion it was said: "In short, the railroad company may use its right of way, not merely for its track, but for any other building or erection which reasonably

tends to facilitate its business of transporting freight and passengers, and by such use in no manner transcends the purposes and extent of the easement, or exposes itself to any claim for additional damages to the original land owner." The authorities support the conclusion that a railroad company may make any use of the land acquired by it for use as the right of way for its railroad, which, directly or indirectly, contributes to the safe, economical, and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands. *Lewis Em. Dom.* §§ 584, 588 and cases there cited; *Gudger v. Richmond & D. Co.*, 106 N. Car. 481, 43 Am. & Eng. R. Cas. 606; *Railroad v. Deal*, 90 N. Car. 110. The land here in dispute must be treated for the purposes of this case as secured to the appellee alone as an additional right of way in the heart of a city. The depot and other structures erected thereon afford such conveniences and facilities as a railroad company may be expected to provide for the transaction of its business in such locality. The land is used for purposes incidental and auxiliary to the transportation business authorized to be conducted on and over it; and as the appellant cannot complain of the exclusive character of the occupancy, the uses shown do not, in our opinion, constitute a diversion of the property from the purposes to which it has been devoted. The conclusion is that the evidence does not support the claim that there has been a misuser by the appellee of the right of way in question. The right to maintain the action is based upon the alleged misuser. It is not intended to be admitted that, if such misuser had been shown, the appellant would be entitled to a judgment in the statutory action in the nature of ejectment for land of which it could not hold possession, because, according to its own claim, the appellee and other railroad companies were entitled to possess it and use it as a right of way. *Cincinnati v. White*, 6 Pet. (U.S.) 431; 3 Brick. Dig. p. 324, § 27.

Affirmed.

**Rights of Railroad Company in Purchased Right of Way.**—The right secured by a railroad company in a right of way by purchase carries with it the same rights, privileges and exemptions which attach when the same right is secured by eminent domain. 1 *Rorer on Railroads*, 313; *Conwell v. Springfield, etc. R. Co.*, 81 Ill. 232; *Junction R. Co. v. Ruggles*, 7 Ohio St. 1. The power to purchase lands necessary to the carrying out of their objects is a power incident to all corporations unless they are specially restrained by their charters or by statute. 2 *Kent's Com.* 281; *Nicholl v. New York, etc. R. Co.*, 13 N. Y. 137; *Co. Lit.* 44a; 1 *Kyd. on Corp.* 76, 78, 108; *First Parish v. Cole*, 3 Pick. (Mass.) 232; *Page v. Heineberg*, 40 Vt. 81; 94 Am. Dec. 378. A company acquiring a right of way by private grant is not released from its statutory obligations as to fencing, etc., even

though nothing is said of it in the deed. *Polar v. New York Cent. R. Co.*, 16 N. Y. 476; *Clarke v. Rochester, etc. R. Co.*, 18 Barb. (N. Y.) 350. The right to cast smoke, cinders etc., upon other parts of the way passes to the grantee of a right of way by necessary implication, being an incident to the operation of the railroad. *Chicago, etc., R. Co. v. Smith*, 111 Ill. 363, 29 Am. & Eng. R. Cas. 558.

Where land is conveyed to a railroad company for railroad purposes, it is presumed that all the contingent damages, which would have been included in an assessment of damages by commissioners, were considered in determining the price. *Norris v. Vermont Cent. R. Co.*, 28 Vt. 99. And the same duty as to the construction of its road and the building of necessary culverts, embankments, fences, etc., rests upon the company as would have existed if the land had been taken under the right of eminent domain. *Hortzman v. Covington, etc. R. Co.*, 18 B. Mon. (Ky.) 218; *Smith v. New York, etc., R. Co.*, 63 N. Y. 58.

A grant of the right of way carries with it the right to construct suitable culverts; and the right to construct such culverts includes the power to cut the necessary ditches to carry the water into them, although such ditches may extend beyond the limits of the right of way. *Babcock v. Western R. Co.*, 9 Met. (Mass.) 553; 43 Am. Dec. 411; *Boothby v. Androscoggin, etc., R. Co.*, 51 Me. 318; *Rood v. New York, etc., R. Co.*, 18 Barb. (N. Y.) 80; *Horstman v. Lexington, etc., R. Co.*, 18 B. Mon. (Ky.) 218; *Conwell v. Springfield, etc., R. Co.*, 81 Ill. 232. Compare, however, *Kansas Pac. R. Co. v. Muhlman*, 17 Kan. 224; 9 Am. Ry. Rep. 428. One who, by deed, grants a right of way over his premises impliedly waives all rights to damages, not reserved in the deed occasioned by the removal of timber or other obstructions in the line of the right of way. *Houston, etc., R. Co. v. McKinney*, 55 Tex. 176, 8 Am. & Eng. R. Cas. 723. But in *Vermilya v. Chicago, etc., R. Co.*, 66 Iowa 606, 23 Am. & Eng. R. Cas. 108, it is said that a grant of a right of way does not authorize the company to take sand from the land without making compensation to the owner.

The grant does not release the company from liability for damages caused from its negligent construction of the road. *Houston, etc., R. Co. v. Adams*, 58 Tex. 476. When the grant is expressed to be for a particular use neither the grantor nor any claiming under him can object to the use and recover damages resulting therefrom. *Chicago, etc., R. Co. v. Smith*, 111 Ill. 363, 29 Am. & Eng. R. Cas. 558. As to the laying of side tracks, see *Indianapolis, etc., R. Co. v. Rayl*, 69 Ind. 424, 3 Am. & Eng. R. Cas. 182. That a grant conveys by implication what is necessary to its enjoyment, see *Chicago, etc., R. Co. v. Smith*, 111 Ill. 363, 29 Am. & Eng. R. Cas. 558; *Riedinger v. Marquette, etc., R. Co.*, 62 Mich. 29, 29 Am. & Eng. R. Cas. 611.

Grant of a right of way gives no license to overflow grantor's land by the unskillful construction of a levee. *St. Louis, etc. R. Co. v. Morris*, 35 Ark. 622, 5 Am. & Eng. R. Cas. 48. The execution of a contract for the right of way by the land owner gives the company an immediate right of entry; and if indefinite as to location, the company has the right of selection. *Burrow v. Terre Haute, etc. R. Co.*, 107 Ind. 432, 29 Am. & Eng. R. Cas. 574.

See as to title acquired by railroad company under conveyance of right of way by land owner, note, 30 Am. & Eng. R. Cas. 303.

## KREMER

v.

CHICAGO, MILWAUKEE &amp; ST. PAUL R. CO.

*(Minnesota Supreme Court, July 22, 1892.)*

**Entry on Land Under License—Revocation—Delay.**—Where a railway company enters upon land and constructs its road under the mere license of the owner of the land, such license is a protection for acts done under it; but upon its revocation the company may be ejected from the premises, unless the right to continue to occupy the same is acquired by purchase or condemnation. The land owner's right of action is not impaired by mere inaction or delay in bringing suit, within the statutory time.

**Eminent Domain—Damages—Injury to Entire Tract.**—In condemnation proceedings, the owner is entitled to have his compensation in damages assessed for the injury to the entire tract owned by him, of which the land appropriated by the company is a part, as of the time of the assessment of damages. It is for the jury to determine the extent of the injury as affecting different portions of such tract.

**Application for Assessment of Damages—Motion Addressed to Discretion of Court.**—Where, in an action for the recovery of land unlawfully occupied by a railway company, the latter, in its answer, asks for an assessment of the damages for the appropriation thereof, under the statute, it is entitled to abandon or dismiss such application at any time before the final submission of the case. But where it fails to assert such right and asks to amend its answer, or for leave to dismiss or abandon such application for an assessment of damages, and the motion is treated and disposed of as one addressed to the discretion of the court, it will be so treated in this court, and the decision of the trial court will not be interfered with, except in case of an abuse of discretion.

APPEAL from Faribault District Court.

Ejectment. Judgment for plaintiff. Defendant appeals.

*A. C. Dunn* (*John W. Cary* and *H. H. Field*, of counsel), for appellant.

*Daniel Buck* and *D. F. Morgan*, for respondent.

VANDEBURGH, J.—The plaintiff alleges that he is and for more than three years has been, the owner of a tract of land in Blue Earth county, containing upwards of 1,300 acres, which is traversed by the defendant's railway. The railway was constructed upon and over the land before plaintiff acquired title; but it never obtained the lawful right so to do, by condemnation proceedings or otherwise, and has never paid any compensation for the land occupied by it, or for the damages caused by the construction and operation of its railway thereon. He therefore seeks

by this action to recover possession, to eject the defendant from the premises, and for damages caused by the occupation thereof. The answer takes issue upon the allegations of plaintiff's ownership, and also alleges "that the predecessors in interest of the defendant entered upon and built the railroad over and across the said lands with the full knowledge, consent and acquiescence of the then owners of the same, and that, ever since its purchase and operation of the said railroad, it has continued to use and occupy the said strip of land for its railway purposes until the commencement of this action, without notice from the plaintiff or other persons that its use and occupation thereof was in any manner unlawful, and without objection from the plaintiff or other persons that the piece of railroad built and constructed as aforesaid is a part of its line of railway from Wells to Mankato, and is necessary to the proper enjoyment of its rights and franchises, and to the discharge of its duty to the public as a carrier of freight and passengers." It also alleges that it is ready and willing to make compensation for the damages arising from the appropriation of the land in question, and therefore asks that they be ascertained as provided by the statute by the jury in this action, if the plaintiff on the trial shall establish his right to recover the said strip of land.

1. The evidence sustained the allegations of plaintiff's title and ownership, and there was no evidence in the case tending to show that defendant's occupancy of the premises was lawful, except that the same was by the license, express or implied, of the grantors of the plaintiff. If the original entry or subsequent occupancy of the premises, to the time of plaintiff's purchase was by the license of the grantors of the plaintiff, such license is a protection for any acts done under it; and in any event the plaintiff would have no right of action for use and occupation or trespasses committed by defendant in the construction or operation of its road thereon prior to his purchase, unless he had acquired such right by assignment. It did not pass by the conveyance of the land. But such license, if any there was, was subject to be revoked at any time by the licensor; and thereafter the defendant would become a trespasser, and the land owner would be entitled to his remedy, either in trespass or ejectment, as he might be advised. The sale and conveyance of the land to the plaintiff was by itself a revocation of any previous license, and the plaintiff had a right immediately thereafter to bring his action to recover the possession. *Eggleston v. New York & H. R. Co.*, 35 Barb. (N. Y.) 162; *Miller v. Auburn & S. R.*

License—  
Revocation—  
Delay.

Co., 6 Hill (N. Y.), 61; 2 Am. Lead. Cas. (5th ed.) 576; Johnson v. Skillman, 29 Minn. 95.

Plaintiff's right of action is not impaired by his inaction or delay in seeking his legal remedy. Defendant acquired no rights in the land or to the possession, by its entry and occupation. On the contrary it has been a continuous trespasser, except as to acts done under a licensee. The contention of the defendant that by its entry and possession and the construction of its road, it lawfully appropriated the land, and that the right to compensation therefor accrued to the plaintiff's grantor, finds no support in the decisions of this court. The title was never divested. It passed to the plaintiff, and as to him the defendant is simply a trespasser; and it can only acquire the right to use the same by grant or condemnation proceedings as provided by law. Lamm v. Chicago, St. P., M. & O. R. Co., 45 Minn. 73, 77, 46 Am. & Eng. R. Cas. 42; Galway v. Metropolitan El. R. Co., 128 N. Y. 132. The plaintiff was clearly entitled to recover the premises in question unless the defendant availed itself of its privilege under the statute of having its damages assessed in the same action.

2. The court, having denied defendant's application to withdraw the claim set up in its answer for an assessment of damages as for a condemnation of the land, the case was heard and disposed of upon the merits of such application, and a verdict rendered, assessing the damages accordingly. The right of way claimed by defendant, and occupied by it, extends through seven 40-acre tracts or government subdivisions. It claims that plaintiff's damages should be limited to those tracts actually crossed by the railway, and those which, at the time of the construction of the road, were part and parcel of the tracts so crossed, so as to form therewith entire tracts or bodies of land owned by one common owner. The court, however, left it to the jury to determine from the evidence whether the body of land in question claimed and owned by the plaintiff when the action was brought and at the time of the trial was so situated, occupied and used, taken together, as to constitute one farm. It is a well-established rule that the owner is entitled to have his compensation or damages assessed for the injury to the entire tract of which the land appropriated is a part, and mere artificial or nominal lines of division are not material where the several lots or parcels adjoin and are held and used for a common purpose, so that they may properly be treated as an entirety for the assessment of damages. The evidence tended to show that the whole tract in this case constituted one farm;

Condemnation  
—Damages—  
Injury to en-  
tire tract.

and though very large in extent, we are not prepared to say that the question was not properly left to the jury. It was for the jury to ascertain the extent and nature of the injury, subject to the rules of law; and if some portions were not affected at all, and some less than others, these were matters which they would be expected to consider in making up their estimate.

The court also properly instructed the jury that the damages were to be assessed as of the time of the trial. The condition of the property and state of the title at that time must govern in determining the amount of plaintiff's compensation. It was not material, therefore, that plaintiff's farm had been enlarged by the purchase of adjacent tracts subsequent to the construction of the road, and prior to the condemnation proceedings. Whether the land in question constituted at the time of the trial one tract or farm, and the extent which the whole or any portion thereof might have been injured, were questions for the jury. It is clear that a body of land may be so large, though owned by one person and used for a common purpose that all portions of it would not be injuriously affected and the line would have to be drawn somewhere within reasonable limits; but this would necessarily be determined upon the evidence disclosing the facts and circumstances in each particular case.

In this case the damages assessed appear to be very large, but the amount thereof is not among the errors assigned on this appeal.

3. At the trial, before any testimony was introduced, the record shows that "the defendant moved the court for leave to withdraw all that portion of its answer that seeks to obtain a condemnation of the land alleged to be the right of way strip; thereby leaving the issue to be tried as originally made by the complaint, with the denials of the answer." This application, respondent claims, should be interpreted as an application to the court to amend the answer by striking out and eliminating therefrom the claim for an assessment of damages under the statute. Upon the argument in this court, the defendant's counsel insists that it was entitled to abandon the condemnation proceedings as a matter of strict legal right. And this is, we think, the correct view of the law. It differs from the case of *Witt v. St. Paul & N. P. R. Co.*, 35 Minn. 404, for the reason that in this case such abandonment leaves plaintiff's remedy wholly unimpaired in the suit already pending for the recovery of his property with damages—just the remedy he asks for and is entitled to by law, if he is the owner and there is to be no condemnation.

Motion to  
withdraw  
portion of  
answer.



It resembles the case of an ordinary counterclaim in an answer, which the defendant may withdraw before or at any time during the trial, upon the proper notice or order of the court, filed or made part of the record. *Brown v. Butler* (Sup.), 12 N. Y. Supp. 810. But the majority of the court is of the opinion that the defendant did not, by its application, withdraw or show an intention to assert its legal right to withdraw its statutory claim for an assessment, but that it was an application in form addressed to the discretion of the trial judge, and he would have a right to so consider it and dispose of it; and so considered there was no abuse of discretion in denying it. But I am inclined to think that it was error, because the defendant had the right to abandon, and the application should be deemed as a motion to have the claim for an assessment expunged from the record so as to show such withdrawal; and such motions, when the legal rights of the parties are clear, should not be given a strict or technical construction, or deemed discretionary, merely.

This disposes of all the assignments of error which we deem necessary to consider.

Order affirmed.

**Ejectment against Company Constructing Road on Land Without Authority.**—In *Dodd v. St. Louis & H. R. Co.* (Mo. March 2, 1892) 18 S. W. Rep. 1117, it was held that where a person conveys a portion of his land to a railway company for the purpose of constructing a road thereon, and with full knowledge permits the company to construct a railroad through other portions of his land also, and allows 16 years to elapse after the completion of the road before making any objection thereto, such person cannot recover such land in ejectment. The court said: "It is well settled in Missouri that ejectment will lie where a railway company builds its road over land to which it has acquired no requisite title by condemnation or conveyance or license, express or implied. *Walker v. Chicago, R. I. & P. R. Co.*, 57 Mo. 275; *Bradley v. Missouri Pac. R. Co.*, 91 Mo. 500, 30 Am. & Eng. R. Cas. 379. And it is equally well settled that a party who, with full knowledge, stands by and permits a company to expend large sums of money in the construction of a railroad through his land, without objection, forfeits his right of ejectment. *Kanaga v. St. Louis, L. & W. R. Co.*, 76 Mo. 207; *Provolt v. Chicago, R. I. & P. R. Co.*, 57 Mo. 257; *Masterson v. West End N. G. R. Co.*, 72 Mo. 343; 4 Am. & Eng. R. Cas. 439; *Reichert v. St. Louis & S. F. R. Co.*, 51 Ark. 491, 38 Am. & Eng. R. Cas. 453, 5 Lawy. Rep. Ann. 183, and notes. This right is forfeited by virtue of the application of the doctrine of estoppel as well as the intervention of public interests. Property in a railway is peculiar. A railway may be likened to a chain, which is worthless with one link out. The ejectment of the company from a mile or half a mile of its track almost wholly destroys the value of the entire line. The land owner knows this, and when he stands by and sees large sums of money expended on his land, and probably millions expended in the construction of the whole road, and interposes no objection, every consideration of justice and fair dealing requires that he should not be permitted to destroy such vast interests by wresting possession of a part of the road from the company, and thus severing its con-

nections. And again, ordinarily, the party who obtains possession of land from one who has made valuable improvements thereon can utilize such improvements, *i. e.*, the improvements are as valuable to him as the party that made them, and he will be compelled to pay for them, if made in good faith. But not so with a railroad. The improvement is not only of no value to the land owner, but is in fact a nuisance, till removed. Ties and rails and culverts and embankments and cuts are an actual injury for all purposes except a railroad, and hence it would be unjust to make the land owner pay for that which has not enhanced the value of his property, but on the contrary, has depreciated it, for the purposes to which he wishes to put it. The ejectment, then, of a railway company from a portion of its road, operates as a destruction, not only of the portion taken, but of the whole road, in a great measure. The doctrine of estoppel, therefore, applies with great force to the taking of property for a railway. In such case we can pertinently say that he who will not speak when he should ought not to be permitted to speak when he would."

**Ejectment against Railroad—License and Consent as a Defense.**—In ejectment to recover land over which defendant's railroad was being operated, plaintiff's title was admitted, but her parol grant by her, per her husband, and her acquiescence in the building of the road over her land, was relied upon as a defense; also that the road was being used for public purposes. There was evidence that plaintiff never consented to the construction of the road over her land; that she knew of it, and objected; that her husband objected, and forbade the engineer and those in charge of the workmen entering. The evidence was conflicting as to whether plaintiff had consented. The action was brought within two months after the road was built. *Held* error to peremptorily instruct the jury to find for defendant. *Holloway v. Louisville, St. L. & T. R. Co.*, (Ky. Nov. 14, 1891) 17 S. W. Rep. 572.

**Trespass on Land by Railroad—Statute of Limitations.**—By Rev. St. Ind. 1881, § 292, barring in six years an action against a railroad company for a tortious entry on lands, the cause of action accrues when the unlawful entry is made, and the running of the statute is not affected by a change in the ownership of the railway. *Pickett v. Toledo, St. L. & K. C. R. Co.*, (Ind. May 12, 1892), 31 N. E. Rep. 200.

In *Wood v. Michigan Air Line Co.* (Mich. Feby. 5th, 1892), 51 N. W. Rep. 265, it was held that where a railroad company enters land, and unlawfully erects and operates a railroad thereon, the owner, after an action for trespass is barred by limitations, cannot maintain trespass based on the continued holding, since possession in the owner, either actual or constructive, is essential. The court said: "The right of action in trespass for the original disseisin having become barred by the statute, the remedy by trespass cannot be given for acts of defendant committed while in full possession of the premises. Undoubtedly the true owner may rely upon his constructive possession of the lands which are not actually occupied, and may have an action for the disseisin against the disseisor to recover not only for the unlawful entry, but for the continuing possession, if the action is brought within two years next after the original entry; but he cannot lie by until the right of action based upon the original disturbance of his possession is barred, and maintain an action distinctively based upon the disseisor's continued holding. Possession in the plaintiff, either actual or constructive, is essential. *Ruggles v. Sands*, 40 Mich. 560; *Carpenter v. Smith*, *Id.*, 639."

**Entry on Land by Railroad Company Without Objection—Waiver by Land Owner.**—Where a railroad enters upon the land of another in the course of its construction, and builds its road and road bed, without opposition, upon the same, and the party makes no objection for several years, his act

will be construed into a waiver. His claim against the road must be for compensation at the domicile of the company. He does not abandon his claim for compensation by the tacit waiver. *Payge v. Morgans L. & T. R. & S. Co.* (La., July, 1891,) 10 So. Rep. 10.

**Action for Use of Right of Way by Railroad—Land Owner's Failure to Object.**—In an action against a railroad company for the use of land occupied by it as a right of way, the fact that the land has been used for 11 years as a right of way without objection by the plaintiff is not conclusive proof that he consented. *Childs v. Kansas City, St. J. & C. B. R. Co.* (Mo. Nov. 9, 1891) 17 S. W. Rep. 954.

## DODGE

v.

## BOSTON & PROVIDENCE R. CO.

(154 Mass. 299.)

**Deed of Right of Way—Condition for Free Passage on Railroad—"Family."**—A land owner granted a right of way to a railroad company the deed providing that "the said grantor and his family shall have and enjoy free rights of passage" in its cars over the road "so long as the land and appurtenances herein before described shall continue to be used "for railroad purposes under its charter. *Held*, that a grandchild of the grantor, after ceasing to be a member of the grantor's household, was not entitled to a free pass over the railroad as one of his family.

APPEAL from Suffolk Superior Court.

Bill in equity for specific performance dismissed the bill. Plaintiff appealed to the full court.

*J. H. Benton*, for defendant.

**LATHROP, J.**—This is a bill in equity, filed on February 23, 1888, for specific performance of an agreement alleged to have been made by the defendant, in 1836, with  
*Case stated.*

John C. Dodge, the plaintiff's grandfather. The case was heard before a single justice of this court upon the pleadings and evidence, and comes before us on the plaintiff's appeal from a decree dismissing the bill.

From the evidence it appears that the defendant corporation, on December 23, 1883, took, by the right of eminent domain, a parcel of land belonging to John C. Dodge in the town of Attleborough, and, having constructed its road over the land so taken, began to run trains of cars from Boston to Providence on August 23, 1835. By deed dated September 1, 1836, and acknowledged on May 6, 1837, John C. Dodge conveyed a right of way over the land so taken to the defendant. After the description of the premises conveyed, and before the *habendum*, were the following clauses: "It being understood and agreed by and between the said parties to

this deed that the said corporation shall erect, make, and keep up all necessary fences between the lands of the grantor and the land taken for said railroad. And it is further agreed by and between the said parties to this deed, and the said corporation by the acceptance of this deed do covenant and agree to and with the said grantor, for themselves, their successors and assigns, that the said grantor and his family shall have and enjoy the right of free passage on and over said railroad in the cars of said corporation, their successors and assigns, as long as the land and appurtenances hereinbefore described shall continue to be used as a railroad or for railroad purposes under the charter of said corporation."

It further appears from the evidence that in 1836 John C. Dodge had nine sons living with him; that in 1854 or 1855 he left this commonwealth, and did not return to it, and died in January, 1866; that the plaintiff's father, a son of John C. Dodge, was living with him in 1836, and continued to live with him from that time until about a year after his own marriage in 1846; that he left the commonwealth in 1850, and returned to it in 1885 or 1886, and now resides here.

In regard to the plaintiff, the testimony shows that she was born in 1854 or 1855 in the state of Pennsylvania; that when she was a child she lived for some time in the family of her grandfather after he left this commonwealth; and that she returned here with her father in 1885 or 1886, and has since lived with him.

The evidence was somewhat conflicting on the question whether the defendant has by its acts recognized the plaintiff as a person entitled to ride free over its road. It does appear that when she was a child she occasionally went over the road, when accompanied by her father or mother, and was allowed to do so; and that, since she came of age, passes had been occasionally given to her, she claiming the right to have them, but, as she states in her brief, "usually on objection by the officer of the company." On this state of the evidence, we need not consider how far the defendant would be bound by what the plaintiff contends is the practical construction put upon the deed by the officers of the defendant corporation. We find nothing in the evidence to show conclusively that what was accorded to her after she came of age was other than as a favor.

We pass, therefore, to the consideration of the construction of the deed. The word "family" has several meanings. Its primary meaning is the collective body of persons who live in one house, and under one head or management. Its secondary meaning is those who are of the same lineage, or descend from one common progenitor.

Meaning of  
family.

Unless the context manifests a different intention, the word "family" is usually construed in its primary sense. In *King v. Darlington*, 4 Term R. 797, under the settlement act of 8 & 9 Wm. III, chap. 30, which provided for the granting of a certificate to a poor person who wished to remove from his own parish to another, and that the latter parish should "be obliged to receive and provide for the person mentioned in the certificate, together with his or her family," it was held that the certificate did not extend to a grandchild of the person receiving it, who lived with his father, and not with his grandfather. Lord KENYON, C. J., said: "In common parlance, the family consists of those who live under the same roof with the *pater familias*,—those who form (if I may use the expression) his fireside. But when they branch out, and become the heads of new establishments, they cease to be part of the father's family." See, also, *Oystead v. Shed*, 13 Mass. 520; *Bowditch v. Andrew*, 8 Allen (Mass.) 339; *Poor v. Humboldt Ins. Co.*, 125 Mass. 274; *Bates v. Dewson*, 128 Mass. 334; *Bradlee v. Andrews*, 137 Mass. 50; *Phelps v. Phelps*, 143 Mass. 570.

The plaintiff, however, contends that, the words, "so long as the land and appurtenances hereinbefore described shall continue to be used as a railroad, or for railroad purposes, under the charter of said corporation," imply perpetual succession, and must necessarily include all the descendants of John C.

No implication of perpetual succession.

Dodge.

But we are of opinion that these words are words of limitation of the grant, and not words extending the meaning of the word "family." By the charter of the defendant corporation, the commonwealth reserved the right, at any time after 20 years from the opening for use of the road, to purchase of the corporation its railroad, and its franchise, property, and privileges. St. 1831, chap. 56, § 12. The words "under the charter of the corporation" were therefore necessary to limit the agreement to carry to the time the corporation might have the power to use the land for railroad purposes.

So, too, the words "used for railroad purposes" were a necessary and proper limitation of the contract to carry. If the location of the road were changed, and the land conveyed by Dodge should revert to him, the parties would naturally provide that the contract to carry should be at an end.

Other contingencies might also happen. By St. 1831, chap. 81, approved March 11, 1831, the charter of the defendant corporation could be repealed at the pleasure of the legislature; its franchise might be forfeited for misuser or non-user, or it might be surrendered.

All these considerations show that the words in question were words of limitation, and did not extend the word "family" so as to include the descendants of John C. Dodge to the remotest generation. We are of opinion, therefore, that the plaintiff, after she ceased to be a member of her grandfather's household, was not entitled to a free pass over the road of the defendant as one of his family.

Decree dismissing the bill affirmed.

**Agreements for Free Pass Over Railroad in Consideration of Right of Way.**—See *Pennsylvania Co. v. Erie & P. R. Co.* (Pa.) 29 Am. & Eng. R. Cas. 549. *Martin v. New York etc. R. Co.* (N. J.) 12 Am. & Eng. R. Cas. 448. **Same—Road Changing Hands.**—In *Eddy v. Hinnant* (Tex. Nov. 29, 1891) 18 S. W. Rep. 562, it appeared that land for right of way was conveyed to a railroad company in consideration, among other things, of free passage for plaintiff at all times over the road. The conveyance provided for a forfeiture on failure to comply with any condition. The road changed hands, but without any agreement in regard to plaintiff's having a pass. It was held that, though defendant furnished a pass for a while, plaintiff could not recover damages from it for failure to continue the pass; plaintiff's right of action being against the company, to whom the conveyance was originally made. The court said: "If it be admitted that the East Line Company sold and conveyed its railroad and other property to the Missouri, Kansas & Texas Company as far as it was in the power of the one to buy or the other to sell, yet, in our opinion, it does not follow that the plaintiff could recover in this case. The contract made by his brother with the East Line Company, in so far as it stipulated for a free passage for him, inured to his benefit, and under the rule of decision in this state he had a right of action for its breach against the company with whom it was made. But, in order to show a right of action in the present case, it was necessary for the plaintiff to prove not only that the Missouri, Kansas & Texas Company bought the East Line Railroad, but also that it assumed the obligations of the East Line Company, or at least assumed to perform the particular contract upon which the action in this case is based. If A. sell B. a tract of land upon which a vendor's lien exists in favor of C., the land may be subjected to the payment of the debt; but B. is not liable upon the contract for the purchase money, unless in his contract with A, he has assumed to pay it. Nor would any recognition of the promise of A. to pay C. the purchase money, or any part payment upon it, make him liable personally upon it. And so with the Missouri, Kansas & Texas Railroad Company and its receivers in this case. They could respect the contract of the East Line & Red River Railroad Company as long as they desired, but they were not bound to perform it. It is true that by the failure to perform they may have forfeited the title to the right of way and to the other property conveyed by B. C. Hinnant and his wife to the East Line Company; still they were not responsible in damages for the failure to carry it out. On the other hand, the East Line Company, even if it had the power to sell its road, could not by a sale divest itself of its obligations upon the contract made with B. C. Hinnant and wife for the right of way through his premises. For a breach of the contract B. C. Hinnant would have a right either to insist upon the forfeiture or to sue the East Line Company for damages; and for a breach of the contract as to him the plaintiff is entitled to his action against the latter company, but not against the receivers of the Missouri, Kansas & Texas Company. The judgment is reversed, and the cause remanded."

WHITE *et al.*

v.

## NEW YORK &amp; NEW ENGLAND R. CO.

*(Massachusetts Supreme Judicial Court, Mar. 31, 1892.)*

**Right of Way—Construction of Deed—Reservation of Passway.**—A conveyance to a railroad company of a strip of land already occupied by it, such strip dividing the land of the grantor into two tracts, the only access to the larger of which was by a passway over the smaller tract and the railroad, the deed "reserving the passway at grade over such railroad where now made," construed to mean that it was the intention of the parties to annex the right of passing to the larger tract as a perpetual easement, the language used being sufficient for the purpose.

**Same—Estoppel to Deny Grantor's Title.**—A railroad company which elects to take a deed from a land owner granting it a strip of land on which its road is constructed, and to hold under such deed, is estopped to deny that such owner had at least such an interest in the land conveyed to it that he could carve out of it a passway over such strip of land and railroad for perpetual benefit to the land which he kept.

## REPORT from Norfolk Superior Court.

In 1848 the Norfolk County Railroad Company, defendant's grantor, located its road across certain land belonging to Emmons Partridge. The road, as thus located, divided the land into tracts containing about 4 and 33 acres, respectively. The former adjoined a highway, but the only lawful means of access to the latter was by a passway over the smaller tract and the railroad. On January 3, 1850, Emmons Partridge, in consideration of \$450, conveyed to the Norfolk County Railroad Company the strip already appropriated by it, together with the right to use the land for a railroad, "hereby releasing all claim for damages for making, maintaining, and using said railroad, reserving the passway at grade over said railroad where now made." This passway had been used before the location of the road, and, without objection from the companies, was used by Partridge and his grantees until 1889, when defendant took up the planks of the crossing, and built fences across the way. In 1865 Partridge conveyed the land on both sides of the railroad to Lyman D. Ware, who in 1879 entered into an indenture with defendant, for the purpose of defining the boundary lines of the defendant's strip of land, in which it is stipulated that "nothing herein contained, however, is to be construed \* \* \* to cut off or obstruct the existing passway at grade enjoyed by said Ware, being the same reserved in the deed

made by Emmons Partridge to the Norfolk County Railroad Company, dated January 3, 1850." On August 2, 1881, Lyman D. Ware conveyed to the New York & New England Railroad Company, to form a part of the strip of land aforesaid, a narrow strip of land lying along the southerly side of the railroad, and being part of the smaller lot now owned by the plaintiff, lying south of the railroad, by a deed which contained, at the end of the description, and just before the *habendum*, the following words: "Nothing in this deed is to be construed as cutting off any grade crossings, culvert, or water-course that I now have across or under said railroad." On November 9, 1885, Lyman D. Ware conveyed the two lots above described, with all the privileges and appurtenances thereto belonging, to plaintiff Isabella White, by warranty deed.

*D. E. Ware and Jas. Hewins*, for plaintiffs.

*R. D. Weston Smith*, for defendant.

MORTON, J.—In view of the facts in this case, we think that the deed from Partridge to the Norfolk County Railroad Company operated to except the passageway for the benefit of and as appurtenant to the larger tract, and that it passed with that to the plaintiff. The defendant does not claim that any importance is to be attached to the fact that the word "reserving" was used instead of "excepting." It insists, more broadly, that, by the terms of the reservation, the passageway was limited to Partridge for his life; or, if that is not so, that the railroad company, having by its location acquired the absolute right to use the tracts for a railroad, all that remained in Partridge was the fee, out of which no way could be excepted; and that Partridge could create a perpetual easement only by a reservation in the nature of an implied grant, in which case the word "heirs" was necessary, and its omission was fatal. We think it is evident, from the situation of the land and the surrounding circumstances and those attending the giving of the deed, that it was the intention of the parties that the passageway should be annexed as a perpetual right to the larger tract. It was clear that the larger tract would be wholly inaccessible, unless Partridge and his successors in title were to have the right to use this in some other way. The way had been used before the railroad was laid out. Its use was continued without objection after the railroad was located. No petition for the assessment of damages nor application for a crossing was ever presented to the county commissioners. The consideration named in the deed was \$450, and the deed purported to convey the right to maintain

Use of pass-  
way annexed  
as a perman-  
ent right.



and use the land for a railroad, and released the company from all "damages for making, maintaining, and using said railroad." It would seem as if the whole matter had been settled by the giving and the taking of this deed. Nothing indicates that Partridge intended to place himself in a position less favorable than he would have occupied if he had petitioned for the assessment of his damages and for a crossing; and we think the reasonable inference is that both parties expected and intended the right to be a perpetual one.

We think, also, that this intention is effectually carried out by the deed. The railroad company could have relied upon its location, and the rights acquired under it, leaving Partridge to his petition for damages and a crossing. It did not see fit to do that, but it elected to take a deed from him with full covenants of seisin and warranty. As between Partridge and it and their respective successors in title, it must be deemed to have elected to hold under that deed, and not under its location, and it cannot set up any claim under its location inconsistent with the rights given or reserved in the deed. It cannot use both as its advantage may decide. *Watson v. Watson*, 128 Mass. 152; *Hyde v. Baldwin*, 17 Pick. (Mass.) 308; *Smith v. Smith*, 14 Gray, (Mass.) 532; *Hubbell v. Warren*, 8 Allen (Mass.) 173, 182; *Fitch v. Baldwin*, 17 Johns. (N. Y.), 161. Having elected to take the deed and to hold under it, the railroad company was estopped to deny that Partridge had at least such an interest in the land conveyed to it that he could carve out of it the right of way in question for the perpetual benefit of the land which he kept. The defendant does not question that an exception may be created by words of reservation, and it is clear that it may be done. *Wood v. Boyd*, 145 Mass. 176; *Dennis v. Wilson*, 107 Mass. 592, 593; *Bowen v. Conner*, 6 Cush. (Mass.) 132; *Winthrop v. Fairbanks*, 41 Me. 307; *Smith v. Ladd*, *Id.* 314; *Herrick v. Marshall*, 66 Me. 435. Whether, in a given case, the language shall be construed to create an exception or reservation will depend upon the situation of the property and the surrounding circumstances, in the absence of a declaration in the deed by the parties of their intention as to the nature of a way. *Dennis v. Wilson*, *supra*.

As already stated, the only reasonable construction in the present case would seem to be that it was the intention of the parties to annex the right of passing to the larger tract as a perpetual easement, and, the language of the deed being sufficient for that purpose, it follows that the passageway is to be so regarded. This view of the effect of the deed from Partridge to the Norfolk County Railroad Company renders

Company estopped to deny landowner's title.

it unnecessary to consider the effect of the deed and indenture from Mr. Ware to the defendant, or the acts of the defendant and its predecessor, in maintaining the crossing for so many years.

**Judgment on the verdict.**

**Grant of Right of Way Through Farm—Construction of Deed.**—Where the owner of a large farm in which is a small garden immediately behind his house, grants to a railroad company a right of way across his farm "provided the road runs at back of garden," inserting such a condition in the deed on account of a preliminary survey which had made the road run through the garden, the railroad company has no right to run its line through such garden.

The court said: "It has been insisted by learned counsel that the grammatical construction of these words "at back of garden" mean within and near the back line of the garden. The preposition "at" is used, according to lexicographers, to denote near approach; nearness of proximity. Its primary idea may be conceded to be nearness. So we may admit that it more generally means "within," than "without," in consequence of this idea of nearness. But it is sometimes used to denote "exclusion," rather than "inclusion." It was so construed in the case of *Canal Co. v. Key*, 3 Cranch, (C. C.) 604, where one provision of the charter under construction required that the second section of the canal should begin "at" the termination of the first. Then it was impossible that "at" should mean "in." So from the context, or from the circumstances surrounding the execution of the paper in which it is contained, its meaning may plainly imply an exclusion, rather than an inclusion, of the place referred to. Again, it may be used so ambiguously as to require explanation. One, for instance, may be at a place, and yet not in it, and yet the preposition would serve in either event. It was held, in the case of a covenant to deliver tobacco "at" a warehouse, that the obligee was not bound to deliver it "in" the warehouse. *Duckham v. Smith*, 5 T. B. Mon. (Ky.) 374. The connection in which the word is used furnishes the best definition. This is well illustrated in numerous cases cited in 1 Am. & Eng. Enc. Law, pp. 890-893. The proviso is not that the road is to be constructed "at" the garden. This, in the absence of everything else, might imply that it was to be constructed within the garden. If the clause had read that it was to be located "back of the garden," it would clearly exclude all idea of a location within the garden. The clause is in neither of these terms, but is a combination of both. It is to run "at back" of garden. This may mean within and at back line, or without and back of, according to other circumstances. It becomes necessary to look at the situation of the parties. The garden was in close proximity to the residence. It was a small square of 100 feet. The preliminary location run the line through this garden. Under these circumstances Beeler required that the words "at back of garden" should be inserted before he would sign. In the light of this situation it is impossible to suppose that Beeler intended to make it a condition that the road should be within the garden." *Knoxville, C. G. & L. R. Co. v. Beeler*, (Tenn. 1891) 18 S. W. Rep. 391.

**Release of Right of Way—What Covered Thereby.**—In *McMinn v. Pittsburgh M. & Y. R. Co.* (Pa. Jan. 4, 1892) 23 Atl. Rep. 325, it was held that a release to a railroad company of a right of way, in which the company is discharged also from all damages incurred, or to be incurred, by the location, construction, or operation of the road, does not cover injuries resulting from the negligence of the company in constructing or operating the road. The court said: "It needs no argument to show that a release of

the right of way to a railroad company does not cover injuries resulting from the negligence of the company either in the construction, maintenance, or operation of the road. The cases of *Hoffeditz v. Southern Pa. R. & Min. Co.*, 129 Pa. St. 264, 38 Am. & Eng. R. Cas. 654, and *Updegrove v. Pennsylvania S. V. R. Co.*, 132 Pa. St. 540, do not help the appellant. In the one first cited the drain complained of was constructed prior to the execution of the release, and in the other the claim for damages was made by a property owner on the lower side of the railroad embankment, on account of the surface water having been collected and thrown from the culvert upon his land below. We there said: "These ditches, and this culvert, and this discharge of water are the result, the necessary result, of the construction of the road." Such is not the case here. If the culvert had been properly constructed and kept open, the injury of which the plaintiff complains would not have occurred."

**Reservation in Deed by Railroad Company of a Right of Way—What Covered Thereby.**—Where the Northern Pacific Railroad Company conveyed a portion of the land granted to it by congress to a private person, "reserving and excepting therefrom, however, a strip extending through the same \* \* \* of the width of 400 feet,—that is, 200 feet on each side of the center line of the Northern Pacific Railroad, or any of its branches,—to be used for right of way, \* \* \* in case the line of said railroad, or any of its branches, has been or shall be located on or over \* \* \* said described premises," *held*, that such reservation covered one such strip only, and that the railroad company could not claim a right of way, both for its main line and a branch line, over the tract so conveyed under such reservation. *Held, further*, that where a separate corporation entered upon and located and constructed a line of railroad across said tract, and subsequently leased the same to the Northern Pacific Railroad Company, which latter company operated the same as a branch of its main line, that, whatever interest in or right to the right of way of such road the latter company had, it obtained and held under its lease, and not under the reservation. *Dunstan v. Northern Pacific R. Co.*, (N. Dak. June 17, 1891) 49 N. W. Rep. 426.

**Covenant Running with Land under Grant to Railroad Company—Agreement to Maintain Crossing.**—A provision in a deed of a right of way to a railroad company that the company shall maintain a fence on each side of said right of way, and put in and maintain a farm crossing and cattle guards, is a covenant running with the land, and is binding on the grantee, and on a purchaser of the railroad under foreclosure of a mortgage executed before the land was conveyed, since in taking title to the land it must assume the burdens running with it. *Lake Erie & W. R. Co. v. Priest*, (Ind. April 29, 1892) 31 N. E. Rep. 77.

**Grant of Right of Way with Right to Take Additional Land Necessary.**—Where a right of way is granted, "with right to use such additional land as may be necessary for the construction and maintenance" of the road, the company is bound only to use ordinary care in constructing its road; and the necessity for taking additional land is to be determined by ordinary care. *Gulf, C. & S. F. R. Co. v. Richards*, (Tex. Feb. 2, 1892), 18 S. W. Rep. 611.

**Contract Authorizing Railroad Across Land to Reach Quarries.**—A contract giving to the lessees of plaintiff's quarries a right to lay a railroad track or switch across plaintiffs' land to reach the quarries in order to transport their products to market, *held* not to authorize the laying across plaintiffs' land of a railroad track, part of a long line of an ordinary commercial railroad for general business, not going to the quarries, but passing at a distance. *Shoemaker v. Cedar Rapids, I. F. & N. W. R. Co.*, 45 Minn. 366.

## HUMPHREYS

v.

## RICHMOND &amp; MECKLENBURG R. CO.

*(Virginia Supreme Court of Appeals, Dec. 3, 1891.)*

**Right of Way—Delivery of Contract on Condition—Parol Evidence.**—An agreement by a land owner to deed to a railroad company a right of way in consideration of the construction of the road, may be shown by parol to have been delivered to the president of the company, on condition that no use should be made of it unless necessary to assure the building of the road, or unless the board of directors should make compensation for the right of way.

**Same—Unauthorized Delivery of Contract—Right to Recover Damages.**—After the completion of the road, although the conditions had not been fulfilled, the president turned the contract over to the right of way agent who had knowledge of such conditions. *Held*, that the contract was void, and the owner might recover the damages to his land.

SUIT to enjoin an action at law, to have a contract declared void, and for other relief. From a decree for defendant, complainant appeals.

*W. W. Henry* and *Finch & Atkins*, for appellant.

*T. N. Williams* and *B. B. Munford*, for appellee.

RICHARDSON, J.—This is an appeal from a decree of the circuit court of Mecklenburg county, rendered on the 15th day of April, 1889, in the suit in chancery therein pending, wherein T. F. Humphreys was plaintiff, and the Richmond & Mecklenburg Railroad Company was defendant. The case briefly outlined is as follows: Case stated.

In the year 1863, T. F. Humphreys purchased a tract of land in the county of Mecklenburg, on Roanoke river, near the town of Clarksville, of one Joseph G. Snead. Subsequent to this purchase, in a suit brought to enforce a prior lien, the same land was sold on the 5th of July, 1870, under a decree of court, and was bought in by said Humphreys, and he thereby became the owner in fee of said land. Prior to the purchase by Humphreys, to wit, in the year 1860, the Roanoke Valley Railroad Company had entered upon said land without taking the steps required by law for the purpose, and, without any title to same, had erected thereon earthworks and masonry for the purposes of its railway, and in the construction of said earthworks and masonry took or occupied and seriously damaged several acres of valuable river bottom land belonging to said tract.

The Roanoke Valley Railroad Company became insolvent, and did not complete any part of its proposed line of railway, and some time in the year 1880 the Richmond & Mecklenburg Railroad Company became the owner of the property, rights, and franchises of said Roanoke Valley Railroad Company. Thereupon the Richmond & Mecklenburg Railroad Company entered into an agreement with the Richmond & West Point Railway & Warehouse Company, through the Richmond & Danville Railroad Company, which controlled said Richmond & West Point Railway & Warehouse Company, to build the proposed Richmond & Mecklenburg Railroad from Charlottesville to Keysville, in the county of Charlotte, and a point on the Richmond & Danville Railroad, for a certain amount of the first mortgage bonds of the Richmond & Mecklenburg Railroad Company; but upon the following conditions: (1) That the Richmond & Mecklenburg Railroad Company should acquire a perfect title to all the franchises, property, rights of way, and roadbed of the old Roanoke Valley Railroad Company, the same having been mortgaged and in the hands of trustees; the same to be purchased from said trustees for \$300,000, payable in the paid up capital stock of the Richmond & Mecklenburg Railroad Company. (2) That the said trustees should transfer and assign to the said terminal and warehouse company the said \$300,000 of paid up stock of the Richmond & Mecklenburg Railroad Company.

This arrangement having been effected, and the conditions aforesaid complied with, thereupon P. F. Howard was employed by the Richmond & Mecklenburg Railroad Company to acquire for it the rights of way along the line of the proposed road. In furtherance of that object, he and John B. McPhail, the president of the Richmond & Mecklenburg Railroad Company, approached T. F. Humphreys, and requested him to donate the right of way through his said land; but Humphreys declined to do so, saying he had already subscribed \$1,000 to the capital stock of said company, which was as much as he was able to give it. It seems, however, to have been thought by McPhail that the refusal of Humphreys to donate the right of way through his land, if known, would be injurious to the scheme for securing the donation of the right of way from others along the line. He therefore called on Humphreys again, and proposed a special arrangement. Land owners along the line having been asked to sign a general paper binding them, respectively, to donate the right of way through their lands, Humphreys was asked to sign a separate paper, of similar import, which was to be held by McPhail, and not to be delivered to the

railroad company unless compensation was allowed him or the construction of the road would be prevented by withholding such paper; and, McPhail insisting that the demand for compensation might endanger the building of the road, Humphreys signed and delivered to McPhail the paper, to be held by him subject to the conditions aforesaid. But, after securing said paper, under such circumstances, without securing compensation to Humphreys, or making any effort to do so, although the company had ample assets out of which to make the compensation, McPhail, long after the building of said road was assured, delivered the paper so executed by Humphreys to said P. F. Howard, the regularly employed agent of said Richmond & Mecklenburg Railroad Company, to acquire for it the rights of way along the line of its road, and who was present when said paper was executed and delivered by Humphreys to McPhail, and was fully cognizant of the condition aforesaid upon which it was executed and delivered.

Subsequently, and prior to the institution of the present suit, the Richmond & Mecklenburg Railroad Company brought an action at law in the circuit court of Mecklenburg county against said T. F. Humphreys, the object of which was to collect from him \$700, the balance claimed to be due on his said subscription of \$1,000; and at the October term, 1885, of said court, with the leave of court, said Humphreys filed his bill against said Richmond & Mecklenburg Railroad Company, setting forth substantially the facts above stated, and praying for an injunction to restrain said railroad company from proceeding in said action at law until the further order of the court; that said paper of October 3, 1881, be declared null and void; that the damages to the plaintiff's land be set off against said subscription; and that the defendant company be required to answer, but waiving answer under oath; and for general relief. A temporary injunction was accordingly awarded the plaintiff, but on condition of his confessing judgment in said action at law for the said balance due on said subscription, which was done.

The Richmond & Mecklenburg Railroad Company answered the plaintiff's bill, and claimed that while it may be true, as alleged, that the Roanoke Valley Railroad Company entered upon the land in question about the year 1860, without any authority, and while it may be true that said corporation had no title to said right of way, yet insists that the plaintiff is estopped from raising a question of title as to that corporation, for the reason, that about October, 1881, by a certain paper, he gave the unconditional right of way through his low grounds to Maj. John B. McPhail, then and

now president of the Richmond & Mecklenburg Railroad Company, and with its answer exhibited said paper, or a copy thereof, marked "A." And the said company in its answer denies that it ever entered upon the lands of the plaintiff without permission and in disregard of his rights, but says "that the authority under the paper writing referred to was complete, and which authority was never questioned by the plaintiff, although it was a long time after the paper was executed by him and delivered to Maj. John B. McPhail before respondent began to work on that part of the right of way given by said paper, which intervening time afforded every opportunity for the plaintiff to make any demand he thought proper for compensation, or to object to a continuance of work, and yet said complainant never in any way objected to the work, or said one thing about pay, which, respondent submits, is very strange upon his part, if, under said paper, he was entitled to it." The defendant company denies having ever injured the lands of complainant, but say that said land, if injured, was injured long before by the same embankment placed there by another railroad company, and that, even if the lands have been injured, it is by no fault of respondent, etc. Such is the answer, omitting its merely argumentative features, except that it concludes with a prayer that the injunction awarded the plaintiff be dissolved, and that he be required to specifically perform his agreement to convey said right of way to respondent, etc.

Depositions were taken by both parties, and on the 15th day of April, 1889, the cause came on to be heard, when a decree was rendered dissolving the injunction theretofore awarded in the cause, and dismissing the plaintiff's bill, and from that decree the case is here on appeal.

The case presented for our determination turns upon the legal effect of Paper A, executed on the 3d of October, 1881,

by the appellant, T. F. Humphreys, and delivered to John B. McPhail, to be delivered by him to the Richmond & Mecklenburg Railroad Company upon certain conditions; which paper is as follows: "In consideration of the advantage to be derived from the construction of the Richmond & Mecklenburg Railroad, I promise and bind myself that I will, when thereto requested by the president of the Richmond & Mecklenburg Railroad Company, or such person as may be authorized by him to make the request, grant and convey to the said company, so much of my land as will be sufficient for the construction and convenient use of said railroad through my tract of land, not exceeding the width limited by the law of Virginia in case of condemnation of lands for railroads; such grant to be with condition

Terms of  
contract.

that, in using such land for the railroad, cattle guards shall be provided where fences cross, if there be any such places, and also the necessary road crossings over the railroad. Given under my hand and seal this 3d day of October, 1881. The words 'so much of my land,' at the beginning of the seventh line above, interlined before signing. [Signed] T. F. HUMPHREYS. [Seal.] Signed, sealed and delivered in presence of [Signed] J. B. MCPHAIL, JR. [Signed] P. F. HOWARD."

On the part of the appellant, Humphreys, it is contended that this paper was signed by him and delivered to McPhail upon the express condition, orally agreed upon and understood between them before said paper was signed, that it should be held by McPhail and not delivered or used, until the directory of the Richmond & Mecklenburg Railroad Company should allow Humphreys compensation for the right of way through his land, unless the withholding of said paper would defeat or imperil the building of the proposed railroad, McPhail agreeing and undertaking, as the agent of Humphreys, to present his claim for compensation to said directory, and to endeavor to secure its allowance, the amount of which was left to the discretion of McPhail.

Contentions of parties.

On the other hand the appellee, the Richmond & Mecklenburg Railroad Company, insists that the paper on its face expresses all that was agreed upon and understood between Humphreys and McPhail; that its terms are absolute and unconditional, and that the paper was not signed by Humphreys and delivered to McPhail upon the condition alleged, or upon any condition other than what is expressed on the face of the paper itself; and that the appellant (Humphreys) is bound thereby.

The parties being thus at issue, we must *first* find whether the fact is as alleged by the appellant; and *second*, if so, whether or not such fact may be established by parol evidence, notwithstanding the unconditional character of the paper on its face. The question of fact must be determined by the evidence. Aside from Paper A, relied on by the appellee, the only material evidence introduced on behalf of the railroad company is found in the deposition of John B. McPhail, who was then and is yet the president of the Richmond & Mecklenburg Railroad Company. Contrary to the usual order of procedure, McPhail was the first witness whose deposition was taken in the cause. The only material evidence introduced on behalf of the appellant (Humphreys) is found in the deposition of McPhail himself, and in the deposition of W. W. Wood, who

Evidence reviewed.



was, at the time of the execution of Paper A, the general counsel of the Richmond & Mecklenburg Railroad Company, and in the depositions of F. J. Lupfort, and the appellant, T. F. Humphreys. These depositions will be referred to in the order named; but it is not necessary to enter into a critical analysis of all that is said in them, much of which is either useless repetition or is matter wholly immaterial.

Omitting all useless repetition, and all irrelevant and immaterial matter, John B. McPhail deposes substantially as follows: That he was president of the Richmond & Mecklenburg Railroad Company in October, 1881, when Paper A was signed by Humphreys and delivered to him, by which Humphreys obligated himself to convey to said railroad company the right of way through his land when requested to do so by said company; that P. F. Howard was at the time accompanying him along the line of road, for the purpose of writing agreements securing to the company rights of way, and that said Howard was, he thinks, present when Paper A was signed by Humphreys and delivered to witness; that the Richmond & Mecklenburg Railroad was built by contract with the Richmond & West Point Terminal Company, and that, by the arrangement between the Richmond & Mecklenburg Company and the Richmond & West Point Terminal Company, one of the conditions imposed by the latter upon the former was that, before it would enter into any contract to build the road, the former should acquire title to the right of way and turn the same over to the Richmond & West Point Terminal Company, and that this condition was embodied in a proposition submitted by the president (McPhail) of the Richmond & Mecklenburg Railroad Company to the trustees holding the franchises, right of way and property of the old Roanoke Valley Railroad company for the county of Mecklenburg, and to such private individuals through whose lands the line of road was located, and who had not conveyed the right of way to the Richmond & Mecklenburg Company. And, in answer to a question, the witness further says: "I have a memorandum which I read to the trustees in submitting the proposition referred to, which is marked '1, 2, 3,' and filed by the witness as part of his deposition." The last question asked McPhail in his examination in chief was this: "Did you or did you not agree, as an officer or agent of the Richmond & Mecklenburg Railroad, to pay Mr. T. F. Humphreys for the right of way through his low grounds above referred to?" He answers: "I did not." It may here be observed that this question and answer are not responsive to, but evades the issue joined between the parties. The allegation in the ap-

pellant's bill is not that McPhail, as an officer or agent of the Richmond & Mecklenburg Railroad Company, agreed to pay the appellant (Humphreys) for the right of way in question; but that he, as the agent of Humphreys, agreed and undertook to present his claim to compensation for the right of way to the board of directors of said company, and to urge its allowance, but that he failed to perform his agreement and undertaking, and, in violation of the conditions upon which Paper A was signed by the appellant and delivered to him, he, when neither of the conditions had happened, and long after the building of the road was assured, delivered said paper to the railroad company when he should have returned it to the appellant, Humphreys. McPhail was subjected to a very long and searching cross examination, then to long re-examination and re-cross examination, and finally was subjected, in effect, to a cross examination by the counsel of the railroad company, in behalf of which he was introduced as a witness. The substance of this cross examination, so far as relevant and material, is substantially as follows: In answer to the first question propounded to him, "When you first approached T. F. Humphreys to secure the right of way through his low grounds for the Richmond & Mecklenburg Railroad, did he not decline very promptly to give the same?" McPhail answered, "My recollection is that Mr. Humphreys hesitated and urged that he should have some compensation for the right of way through his lands." He was then asked whether he secured Paper A at the first interview he had with Humphreys, and he answered that he did not remember. Being asked, "Did you not, in securing the right of way for the Richmond & Mecklenburg Railroad, use a paper with the heading obligating the signers to said paper to give the right of way to said road, and which paper was generally used for that purpose?" McPhail answered: "The papers relating to the right of way were drawn by P. F. Howard, who was employed by the company for that purpose. Some years having elapsed, I do not remember the exact form used. I do not remember whether there was a paper for general signature. I know that single papers were used in many cases." Being then asked to state as many instances where single papers were used as he could remember, he answered that he could not remember any particular number; and being asked to name a single instance, he failed to recall even one, but said he was unable to give names without refreshing his memory by the record. He was then asked how, not being able to remember a single instance he was able to swear that in many instances single papers were used, and he answered

that he had stated to the best of his knowledge and belief that many single papers were used, and that he could remember transactions without being able to remember the names of parties; but he added: "I am entirely confident that the right of way papers will sustain my recollection that single papers were used in numbers of cases."

Now, however true all this may be, still the fact stands boldly out that McPhail did not resort to the records to verify the correctness of his statement; nor does he satisfactorily explain why he so confidently remembered that in many cases single papers were used, when he could only recall one single instance, and could not remember the person with whom the transaction was had, and yet failed to remember that when he first approached the appellant, Humphreys, he presented to him the paper for general signature, which he refused to sign, and refused to give the right of way through his land without just compensation.

These matters under other circumstances, would amount to little or nothing; but they become important in view of the fact that the appellant, Humphreys, whose deposition is in the record, among other things testifies positively that McPhail first approached him with the paper for general signature, and solicited his signature thereto, but that he positively refused to sign it or to donate the right of way, giving as a reason for his refusal that he had already subscribed \$1,000 to the capital stock of the company, which was as much, if not more, than he was able to give, and that, if the company needed any more of his property, he was entitled to and demanded just compensation therefor. The appellant, Humphreys, made substantially the same statement to W. W. Wood and F. J. Lupfort, as appears from their depositions. In the course of his cross-examination, McPhail was asked this question: "Have you no recollection of any reason assigned by Mr. Humphreys, on your first interview with him, why he declined to give Paper A? Answer. I do not remember that Mr. Humphreys at any time, positively declined to give the right of way; but I do remember that he hesitated and urged that he should have some compensation."

Now, this is a singular statement, especially in view of the facts disclosed in the depositions of W. W. Wood, the then general counsel of the Richmond & Mecklenburg Railroad Company, and who had repeated conferences with McPhail, the president of said company, with respect to the refusal of Humphreys to give the right of way through his land, and of F. J. Lupfort, both of whom testify positively that McPhail told them that Humphreys had refused

to give the right of way, and urged and induced them, as friends of Humphreys, to see him and use their influence to induce him to recede from the position he had taken, and at the same time urged them to be quiet, and to say nothing about it, as it might influence others who had promised to give the right of way through their lands. They both did call on the same day, though not at the same time, Wood calling once and Lupfort twice; and to each of them Humphreys gave his reasons for refusing to give the right of way when solicited to do so by McPhail, and to each of them he positively refused to recede from his position, and earnestly insisted upon just compensation for the right of way through his land. Lupfort's first visit to Humphreys was in the forenoon; his second, in the afternoon of the same day, when he, in company with McPhail himself, went into the back room of Humphreys' store, where they found P. F. Howard and Humphreys engaged in discussing the matter of the right of way. On this second visit of Lupfort he took no part in the discussion, but stood by and listened to the discussion between Humphreys on the one hand, and McPhail and Howard on the other; and Lupfort says that Humphreys still firmly refused to donate the right of way, and demanded compensation therefor.

In the light of the direct and positive testimony of these two witnesses, it is passing strange that McPhail should say, as he did, that he did not remember that Mr. Humphreys, at any time, positively declined to give the right of way. Moreover, as to what transpired from the time McPhail first approached Humphreys and urged him to donate the right of way until the execution of Paper A. Humphreys himself testifies as follows: "As the work progressed upon the road, before the completion to Clarksville, when sitting at my place of business, two gentlemen entered, one of whom was Maj. McPhail, the other a stranger to me, who was introduced by Maj. McPhail as Mr. Howard, agent of the Richmond & Mecklenburg Railroad to secure the right of way to lands through which it passed, and requesting me to give the right of way through my land. Knowing that it would require some time to explain to Maj. McPhail my position with regard to the matter, I invited him into the rear of my store to be seated, that I might set forth the facts. I then stated to him that I declined to give the right of way; that I had already subscribed my full share, and all that I felt able to subscribe; and that I thought, if the railroad company required any other property that I had, they ought to pay me its value. In the same conversation I stated to him that I had taken a similar position a few years before, when

applied to by the Southern Security Company for right of way. The major seemed much surprised and disappointed, and earnestly urged that I should recede from my position. I was firm, and stated to him that, when taking a similar position with the Southern Security Company, I had stated the facts to a mutual friend, whose name I gave, who fully approved of the position I took. I also think I stated that I would derive neither profit, honor, nor thanks from making a donation to the corporation. Maj. McPhail urged that the effect would be bad, expressed his regrets, and left with Mr. Howard, evidently discomfited. The next day parties came to me and expressed surprise at what they had heard about my declining to give the right of way, and repeating some fabulous stories as to charges that I had proposed to make for the right of way. Later in the day Maj. McPhail again came in, and wished to know if I had reconsidered the matter. I told him I had thought over it, but saw no reason to change my position, and again repeated the arguments used on the previous day. The major then suggested that he had devised a plan which he thought would meet the case. He then suggested that, as I refused to sign the general paper for relinquishment of lands, he would prepare a special paper for my case, and put it in his pocket, and present it to the board, and he thought he might be able to get me compensation, at the same time alleging that the not granting the right of way might imperil the building of the road, and alluded to my being especially friendly to the road, and so looked upon by the community. I promptly met that by stating that nothing that I should ever do should ever imperil the building of the road, and at once acquiesced in the proposition to give a separate right of way, with the proviso that it was not to be used unless the non-use of it obstructed the building of the road, or a directory made me an allowance for the right of way. That seemed to be satisfactory to the major. He then left stating that he would prepare, or have prepared, the paper. A few days after, he came in with Mr. Howard, and produced the prepared paper for signature, which I promptly signed, without any further conversation as to the conditions. Many months elapsed, and I heard nothing further from it. Finally the major, meeting me on the street, remarked to me that he had not yet presented the paper. After several months more we met again, and he then stated to me that he had presented that paper, and that the board refused to make any allowance. I promptly remarked: 'Well, you know, major, the conditions upon which that paper was given.' He did not seem fully to comprehend my meaning,

and I repeated what I understood to be the understanding,—that that paper was not to be used unless the non-use of it obstructed the building of the road or the board made me an allowance for the right of way. I also stated: 'If you will say, major, that the non-use of that paper would have stopped the building of the road, I have nothing more to say.' He promptly stated: 'I will say that if you and others had withheld the right of way it would have obstructed the building of the road.' I stated that that was not what I said."

Having made this full and clear circumstantial statement, which is natural and consistent in all its parts, and is fully corroborated in its most important features, by the testimony of W. W. Wood and F. J. Lupfort, Humphreys is asked this question: "Is your memory clear and distinct upon the conditions on which you signed this Paper A? Answer. Perfectly so; as much so as any event in my past life, having thought of it hundreds of times, and feeling at the same time that all I risked in acceding to the major's proposition was that the directory might have made me a pitifully small allowance for the right of way." The appellant, Humphreys, was further examined in chief, as follows: "Question. Was it your understanding that you would be bound by the paper given by you to Maj. McPhail if the directory did not allow you a satisfactory compensation? Answer. It was my understanding that Maj. McPhail had the right to exercise his discretion in turning the paper over, however small the compensation, provided he believed that the non-use of that paper would have prevented the building of the road. At the time the paper was given the building of the road had progressed so far that I felt that I incurred no risk with that proviso attached, except in the smallness of the allowance that might be made for the right of way, feeling that, if they made no allowance, the proviso came in and nullified it. Q. In your previous answer you have stated that when Maj. McPhail informed you, you promptly remarked, 'Well, you know, major, the conditions upon which that paper was given;' and that you repeated to him what you understood to be the understanding with which that paper was executed, to wit, that that paper was not to be used unless the non-use of it obstructed the building of the road, or the board would make you an allowance for the right of way. When you told him this, did he deny that these were the conditions upon which the paper was executed? A. He did not, but asserted that he would say that, if others had done the same thing, it would have obstructed the building of the road. I regarded that as an evasion, and we had no further conversation on the subject." Now, re-

cunning briefly to the deposition of McPhail, we find in his cross examination the following: "Question. Have you no recollection of saying to Mr. Humphreys that if he would sign Paper A you would go before your board of directors and get them to allow him compensation for the right of way through his low grounds, or something to that amount? Answer. No, sir; I never, at any time, gave Mr. Humphreys the least encouragement that I could get him compensation. The Richmond & Mecklenburg Railroad Company had agreed to acquire title to right of way, and was incompetent to make any such concession without the consent of the terminal company, to which it was under obligations to acquire the right of way. On the contrary, Mr. Humphreys gave the right of way, with the request that I would use my best endeavor to get him some compensation, but named no particular amount. An agreement requiring compensation would have been of no conceivable value, such terms being already provided by law, referring to condemnation of lands for such purposes. I would not have held the paper upon condition that I was to get compensation. It was distinctly understood that I should pass the paper to the company if I could not get compensation, and that the matter of compensation should not be pressed to the hazard of building the road."

Now, observe that McPhail, after returning a plain negative answer to a very simple question, goes on to say that he never at any time gave Humphreys any encouragement as to securing compensation for him. Then enters upon the absurd statement that, inasmuch as the Richmond & Mecklenburg Company, by its arrangement with the terminal company, had bound itself to secure the right of way, it was therefore not competent for that company to do what it had bound itself to the terminal company to do. But in the last sentence of the answer above McPhail practically admits all that is claimed by Humphreys, when he says: "It was distinctly understood that I should pass the paper to the company if I could not get compensation, and that the matter of compensation should not be pressed to the hazard of building the road." And again: "Question. Did this question of compensation by your board arise at the first interview with Mr. Humphreys? Answer. Yes, sir; Mr. Humphreys' withholding right of way for compensation was the first suggestion that crossed my mind in regard to compensation in his case. Q. In answer to question 28, you say that Mr. Humphreys stated to you that he would sign the paper with the understanding that you would try to get him compensation. Now, was this said to you at the first or at a subse-

quent interview with him? A. As that seems to be the end of the transaction, it must have been at the last interview or conclusion of the negotiation. Q. Did you ever try to get compensation for Mr. Humphreys; and, if so, when and from whom, and what was the result of your effort? A. Yes, sir; our only appeal in the matter was to the terminal company, the Richmond & Mecklenburg Railroad Company being utterly destitute of means, except such as had already been contracted to be expended in the construction of the road. I repeatedly made efforts to get money to purchase right of way. Matters were then very shaky. The terminal company showed no eagerness to complete the work, and any faltering on our part as to the condition imposed on us, I feared, would be fatal. I dared not press them harder than I did to do that which we had agreed to do ourselves. I did all that could have been expected or desired by Mr. Humphreys, or that I would have desired or expected from Mr. Humphreys, had our positions been changed."

Now, in his answers to the last three questions, as above set forth, McPhail, notwithstanding his previous statements to the contrary, makes two things certain: (1) That Humphreys did withhold the right of way through his land for compensation; or, in other words, that he did refuse to give the right of way without compensation. (2) That, notwithstanding his admission that the distinct agreement was that he was to try to get Humphreys compensation, he admits that he never made any effort to do so. He was to make application for the allowance of compensation to his board,—the board of directors of the Richmond & Mecklenburg Railroad Company,—of which he was the president; but he admits that the only application ever made was to the terminal company, a company that was confessedly under no obligation, either to the Richmond & Mecklenburg Company or to Humphreys, to pay for rights of way either to Humphreys or any one else, and a company with which Humphreys had no concern whatever. And as to the statement of McPhail that the Richmond & Mecklenburg Company was utterly without means, except such as had already been pledged to the construction of its road, it is not only not borne out by the record, but the contrary clearly appears.

As already stated, the terminal company agreed with the Richmond & Mecklenburg Company to construct the road of the latter company upon two conditions: (1) That the Richmond & Mecklenburg Company should acquire a perfect title to all the franchises, property, rights of way and roadbed of the old Roanoke Valley Railroad Company, then held by trustees for the county of Mecklenburg, by purchas-



ing the same from them for \$300,000, payable in the paid up capital stock of the Richmond & Mecklenburg Railroad Company. (2) That said trustees should transfer and assign the said \$300,000 of stock to the construction company. Both of these conditions were performed; but it will be seen that they did not involve the acquisition, by gift, of the right of way and roadbed through the land of Humphreys or any one else. On the contrary, inasmuch as the old Roanoke Valley Company had never acquired the right of way through the land of Humphreys, the Richmond & Mecklenburg Railroad Company was not only left free to purchase, out of their assets, such rights of way and roadbed, but actually bound itself to the terminal company to do so. And having performed the conditions aforesaid, the Richmond & Mecklenburg Company, on the 27th day of October, 1881, consummated its agreement with said terminal company, whereby the said terminal or construction company agreed to build the Richmond & Mecklenburg Railroad for the sum of \$400,000 of first mortgage bonds of said railroad company to be secured by a deed of trust "on all the works, property, rights, assets and franchises of the said Richmond & Mecklenburg Railroad Company, as well those which it now owns as those which it may hereafter acquire." This contract and deed of trust were both made long prior to the delivery of Paper A by McPhail to the Richmond & Mecklenburg Railroad Company. This contract imposed no prohibition upon the purchase or condemnation by the Richmond & Mecklenburg Railroad Company, of rights of way or roadbed, and, in fact, it had to condemn and pay for some of the lands along the line of its road. Nor did the said deed of trust convey the debts due to the Richmond & Mecklenburg Railroad Company. But, as the deed of trust purported to be upon all the assets of the Richmond & Mecklenburg Company, some of the directors thereof declined to execute it until provision was distinctly made for the debts due by the Richmond & Mecklenburg Railroad Company. This was effected by leaving with the said company \$10,000 of the said first mortgage bonds, for the purpose of discharging said indebtedness, which consisted of some \$7,000 for commissions due to subscription agents along the line of the road and other obligations due by the company to parties who could not give the right of way.

Thus it will be seen that there were not only ample assets of the Richmond & Mecklenburg Company to pay for the right of way through the land of Humphreys out of this \$10,000 of its first mortgage bonds, which, so far as shown by the record, would have been ample; but, in addition, the

company held and controlled its subscription list to its stock, amounting to \$87,167, of which \$55,744 was to be paid in land, \$3,800 in materials, \$6,400 in labor, and \$21,223 in money. Moreover the company retained and held the subscription of Humphreys for \$1,000, for the balance of which the company sued in its own name and right. This balance on subscription the company could, with convenience and justice, have applied, so far as it might go, in compensating Humphreys for the right of way through his land. It is therefore obvious that there is nothing in McPhail's statement as to the then impecunious condition of the Richmond & Mecklenburg Railroad Company. But it is immaterial what was the then condition of the company. If it took his land and property and has used and enjoyed it, without rightful authority, it is liable therefor.

Recurring again to McPhail's cross-examination, it is important to call attention to the last question propounded to him by counsel for the plaintiff (the appellant here) on his recross examination and to his answer thereto, as follows: "Question. Are you not now and have you not continuously been the president of the Richmond & Mecklenburg Railroad Company since its organization in 1880? Answer. I have. I desire to state, further, in acting for Mr. Humphreys, so far as relates to holding the paper, I acted in my individual capacity, and held the paper, so to speak, in escrow." Here is a purely voluntary statement, not called for by the question put to him in which McPhail plainly and unequivocally admits all that is claimed by Humphreys. But the witness is taken in hand by counsel for the railroad company, on whose behalf the witness was introduced, and is examined as follows: First question: "In legal definition 'escrow' means a paper held under condition, not to be delivered until the conditions therein specified had been complied with. Was this such a paper? Answer. The conditions specified in the paper have been complied with by the railroad company, and all other conditions relating to the matter imposed upon me by writing or otherwise." Second question: "Was there any understanding between you and Mr. Humphreys that the railroad company had to do anything as a condition precedent to you passing the paper to the company? Answer. None." Third question: "In answer to a question by plaintiff's counsel you state that, in acting for Mr. Humphreys, as relating to holding the paper, you acted in your individual capacity, and held the paper, so to speak, as an escrow? What did you mean by holding it in escrow? Answer. In using the words, so to speak, I meant something like, and used them only in reference to the

conditions referring to compensation, which conditions are not stated in the paper, and which were complied with before the paper passed out of my hands."

Here ends the deposition of Maj. McPhail. While it contains many inconsistent and irreconcilable statements—due, doubtless, not to any deliberate purpose to misrepresent the facts, but to the want of a retentive memory—yet the deposition, taken altogether, is more in favor of than opposed to the claim asserted by Humphreys, as to the conditions upon which Paper A was signed by him and delivered to McPhail. But, independently of the testimony of McPhail, the evidence clearly sustains the contention of Humphreys, which is that the paper was not to be used unless the withholding of it would defeat the building of the road, or the board of directors of the Richmond & Mecklenburg Railroad Company should make him compensation. Soon after the execution of Paper A the arrangement for building the Richmond & Mecklenburg road by the terminal company was consummated. Henceforth the building of the road was assured, and the only remaining duty imposed upon McPhail was to secure compensation to Humphreys or to return the paper to him. But he admits that he never presented the claim to the board of directors of the Richmond & Mecklenburg Railroad Company, of which he was the president, and that he never even made known the existence of the paper; yet, long after the building of the road was assured, he delivered the paper to Howard, the company's agent, who was fully cognizant of the conditions upon which the paper was signed by Humphreys and delivered to him. Howard's knowledge was the company's knowledge, and the delivery to him was unauthorized, null and void.

These being the facts, it only remains to show that they may unquestionably be established by parol. It is undeniably true that, to have made the delivery in question a valid delivery to the railroad company, it must have been delivered to McPhail, as the agent of the company, "for the use and benefit of the company, and with intent to pass an absolute property or interest in the deed delivered." *Southern L. Ins. & Trust Co. v. Cole*, 4 Fla. 359. In *Devlin on Deeds*, § 316, it is said: "A delivery of a deed, with the intention of passing the title, made to an officer of a corporation, is a delivery to the corporation itself, if it be done for the use and benefit of the corporation. But a deed may be delivered to an officer of a corporation, to take effect as an escrow, upon the performance of a condition, as there is no such personal identity between a corporation and its officers as will prevent a delivery to the latter

Delivery in  
escrow.

as an escrow." For this position the author quotes abundant authority. See the case just cited and *Bank of Haldsburg v. Bailhache*, 65 Cal. 327; *Bowker v. Burdekin*, 11 Mees. & W. 145; *Flagg v. Mason*, 2 Sum. (U. S.) 510; *Millership v. Brookes*, 5 Hurl. & N. 797.

In the same section Devlin says: "It is not an inevitable conclusion that the mere delivery of manual possession is a valid delivery of the deed. If the acceptancy of an agency from both parties, will involve no violation of duty to either, the releasor may make the agent of the releasee his own agent, for the purpose of holding the deed as a escrow, and returning it to him in case a stipulated condition is not performed. The rule that a delivery to an agent of the grantee is equivalent to a delivery to the grantee himself would not apply in such a case, because there is not that personal identity between the releasee and his agent upon which the reason of the rule depends." *Cincinnati, W. & Z. R. Co. v. Iliff*, 13 Ohio St. 235; *Ottawa, O. & F. R. R. Co. v. Hall*, 1 Ill. App. 612.

Howard was the agent of the company, charged with the preparation of deeds to rights of way and the obtaining of their execution. When Howard received the paper, for the purpose of getting a deed, he was fully aware of the conditions on which it had been delivered to McPhail, he having been present when they were agreed upon, and he and McPhail being the attesting witnesses to the paper. This knowledge on the part of Howard must be attributed to the company, of which he was agent. *Newlin v. Beard*, 6 W. Va. 110. See, also, *Ward v. Churn*, 18 Gratt. (Va.) 813, where it is said: "If the delivery is upon a condition made known to the obligee, his assent to it will be presumed from the acceptance of the instrument; and he will not be allowed to repudiate the condition thus assented to, and to treat the delivery as absolute and unconditional." So, too, in *Nash v. Fugate*, 32 Gratt. (Va.) 595, which turned upon an instruction "that a bond, perfect on its face, is invalid in the hands of the obligee if he had notice of the conditions on which it was signed by the defendant." In that case the instruction was sustained, and Judge STAPLES, delivering the unanimous opinion of the court, cites with approval, among others, the case of *Millet v. Parker*, 2 Metc. (Ky.) 608. See, also, *Harris v. Harris*, 23 Gratt. (Va.) 778, and *Newlin v. Beard*, *supra*.

When a deed is delivered to a person to be held until certain conditions are performed, and then to be delivered to the grantee or obligee, it is an escrow; but the person to whom the deed is delivered in the first instance must be the judge as to when the condition is performed, in order to act. His judgment, however,

Contract  
held void.

is always subject to review by a court. Devl. Deeds, § 327. And so, if it is delivered before the condition is performed, equity will declare such delivery void. *Id.* §§ 321, 322; *Hicks v. Goode*, 12 Leigh, 490, 491. The depositary of an escrow is, in fact, the agent of both parties. As the agent of the grantor, it is his business to withhold the deed until the condition is performed; as the agent of the grantee, it is his business to hold it for him, and to deliver it to him after the condition is performed. Devl. Deeds, § 327.

The duty imposed upon McPhail in the present case was to ascertain whether the withholding of Paper A would prevent the construction of the road. By his own admission he ascertained that it would not. His only remaining duty, then, was to get compensation for Humphreys, and, failing this, to return the paper to Humphreys. But he utterly ignored the obligations thus resting upon him; hence his delivery of the paper was without authority, null, and void. *Id.* § 322; *Hicks v. Goode*, *supra*; *Nash v. Fugate*, 24 Gratt. (Va.) 208, 209. We are therefore of opinion that, on the facts and the law applicable thereto, the case is clearly with the appellant, Humphreys, and that the court below erred in dissolving the injunction and dismissing the bill.

There is much evidence in the record as to the damage done to the appellant by the railroad company in occupying his land, earth works, and masonry, and also as to damages to the residue of his tract of land by reason of said earth works or embankment. But this court will not invade the legitimate province of a jury by undertaking to ascertain such damages upon the varient estimates of witnesses, when the object can be better and more safely accomplished by a jury of the vicinage; but will enter a decree reversing and annulling the decree appealed from, and remanding the cause to said circuit court, with instructions to restore the case to its place on the docket, to be proceeded in to a final decree, and with a further instruction that, when the case is matured for hearing, an issue *quantum damnificatus* be directed to be tried at the bar of said court, on the law side thereof, to ascertain the damages aforesaid, and that the same, when so ascertained and duly certified to the chancery side of said court, be set off against said judgment at law confessed by the appellant in favor of the said Richmond & Mecklenburg Railroad Company, and that the excess of said damages, if any, over and above said judgment, be decreed against said railroad company in favor of the appellant, Humphreys.

Decree reversed.

## GULF, COLORADO &amp; SANTA FE R. CO.

v.

JONES.

*(Texas Supreme Court, Nov. 10, 1891.)*

**Consideration of Deed—Location of Depot—Parol Evidence.**—A deed of land to a railroad company stating the consideration to be a certain number of dollars, and another instrument executed at the same time by the land owner reciting that he would do certain acts "in consideration of the purchase of land from me for the location of a town site and the location of a depot at a point between" certain stations, held not to show the entire contract between the land owner and the railroad company, and parol evidence was admissible to show that the consideration of the deed was that the defendant should locate a depot on the land conveyed, although neither fraud nor mistake were alleged.

**Authority of Right of Way Agent to Locate Depot.**—The authority of a right of way agent of a railroad company to agree for the company to locate a depot on certain land purchased by it, held to be shown by a telegram from the general manager of the road, in which he said that if the land was not given they would not locate a depot on it, and other evidence tending to show that he was recognized by the company as its agent with such power, and permitted to execute such power.

COMMISSIONERS' decision. Section A. Appeal from Collin District Court.

Action for breach of contract, and to cancel a deed. Judgment for plaintiff. Defendant appeals.

*J. W. Terry and Alexander & Clark*, for appellant.

*Garnett, Muse & Mangum*, for appellee.

COLLARD, J.—Viewing this case from the standpoint of the appellee, who was the plaintiff below, it may be stated as follows: Plaintiff owned about 1,350 acres of land in Collin County. Defendant's railroad ran through a part of the land, and in March, 1886, plaintiff conveyed to the company a right of way where the road was to run in consideration of one dollar, and the enhanced value to accrue to the land. Expecting to still further increase the value of his land, which was all in one body, plaintiff was desirous of having the company locate a depot and town on the survey, and for this purpose he offered to donate to the company twenty-two acres more of the same. The citizens of a small town in the neighborhood were also bidding for the depot. On the 2nd day of June, 1886, one Col. Wylie, who was agent for the company to secure right of way along

Case stated.

its route, came to see the plaintiff, in the interest of the company in reference to the depot and the land donation. While the matter was being discussed, Wylie produced a telegram from Snyder, the company's general manager, saying that if plaintiff would not give twenty-five acres of land the company would not locate its depot on his land. Plaintiff offered to donate the twenty-five acres, but Wylie demanded twenty-two acres of plaintiff's survey at a designated place, and three acres of land belonging to one Montgomery, adjoining, for convenience in grading. The negotiations resulted in a verbal agreement, by which defendant was to locate its depot on the twenty-two acres, at or near station 1674, between stations 1670 and 1678, for which plaintiff was to donate to the company the twenty-two acres, and to secure the three acres on the Montgomery land at his own cost. He gave Wylie \$120, to tender Montgomery for the part of his land required. The company needed about sixty-two acres more of plaintiff's land, and afterwards offered him \$2,080 for the same, which he agreed to; and on the 21st day of June, 1886, Wylie, acting for the company, drew up a deed for the twenty-two acres and the sixty-two acres, stating the consideration to be \$2,080, for the entire eighty-four acres, (about that quantity,) omitting the facts of donation of the twenty-two acres, and the agreement to locate the depot on the same, Wylie explaining that the company wished to avoid an accumulation of deeds. Plaintiff called Wylie's attention to the fact that the deed did not mention the depot, and Wylie replied "that was all settled, and he would put that in another instrument." The other instrument was prepared by Wylie in writing, and is as follows:

"The state of Texas, county of Collin. Know all men by these presents, that I, J. E. Jones, of said county and state, in consideration of the purchase of land from me for the location of a town site and the location of a depot at a point between stations 1670x00 and 1678, on the located line of the Gulf, Colorado & Santa Fe Railway running northeast to Red River, via Farmersville, I do hereby agree and bind myself, my heirs and legal representatives, to secure and pay for one hundred feet of right of way on the land of J. L. Montgomery from 1670x00 to 1657x00 in order to secure grade for depot purposes without delay. In order that the said company shall not be in any way damaged by delay in construction, I further agree and bind myself to pay said railway company at its office in Galveston any and all damages that the said company shall sustain by such delay that may be occasioned by me in failing to procure said right of way by legal process or otherwise. In witness whereof,

witness my hand this 21st day of June, 1886, in the presence of the subscribing witnesses.

J. E. JONES.

"J. S. RIKE.

"L. E. BUMPAS."

The deed and the foregoing instrument in writing were both executed and delivered to Wylie at the same time, and sent by him to the company, he at the time paying plaintiff the stipulated consideration expressed in the deed, \$2,080. Plaintiff, according to the contract, had the three acres of Montgomery's land condemned for the use of the company, at a cost paid by him of \$220. The company did not locate the depot on the 22 acres, but on other 11 acres, bought by them from Montgomery. Had the company located the depot where plaintiff claimed it should be, at station 1674, or between stations 1670 and 1678, his other land would have been increased in value \$3,000 or \$4,000. Plaintiff brought this suit against the company, setting up the foregoing facts, and that the true consideration was not stated in the deed, and not fully stated in the written instrument. He prayed for cancellation of the deed to the 22 acres, damages to his other land by having it left in bad shape by carving out the land deeded to defendant, the amount paid by him for the Montgomery 3 acres of land, and for damages to the unsold part of his 1,350 acres of land; that is, the difference in its value as now situated and the value in case defendant had located its depot according to the contract. He also alleged that Wylie was fully authorized to make the contract to locate the depot, and that the company, with full knowledge of the facts, ratified the same. He set up fraud of the company, through its authorized agent, in representing to him that the depot would be located as stated, by which he was deceived, and induced to give the 22 acres of his own land, and procure the Montgomery 3 acres, which he would not have done had he known the company would not put the depot on his land.

The case, as made by defendant's evidence, was that Wylie was only authorized to procure right of way for the road, and had no authority to contract for the location of the depot, and that he did not do so; that the company paid the consideration as stated in the deed without any knowledge of the alleged acts or promises of Wylie. Defendant relied upon the deed and the contract in writing, the terms of which could not be changed by parol, and which in fact stated the only agreement of the parties. The charge of the court submitted to the jury the issue as to whether or not, the contract to locate the depot as alleged by plaintiff was made by defendant or its lawfully authorized agent, and, if made by



an agent not authorized, whether the company ratified it with knowledge of the facts; and they were instructed that, if they should find for plaintiff on these issues, that defendant failed to so locate its depot, and that plaintiff's adjacent land would have been worth more, in case defendant had complied with its contract, than it was with the depot as actually located, they should find for plaintiff, as damages, the increase in such value. The court also instructed the jury as follows: "If you find for plaintiff, you will not allow any sum to him as compensation for any land he may have conveyed to defendant, or for any sum he may have paid for it to Montgomery, as the consideration for the contract to locate the depot as aforesaid; but the measure of his damages would be restricted to such sum as will fairly compensate him for the increased value of his land, if any, that would have resulted had the depot been located in compliance with the agreement; and you will not regard any evidence admitted before you as to the value of the 22 acres, which plaintiff claims to have conveyed to defendant as the consideration of said contract, in so far as it bears upon the measure of damages if any." The issues of fraud and misrepresentation were not submitted to the jury. No objection was or is made to the charge. There was a verdict and judgment for plaintiff for \$3,000 from which defendant has appealed.

Appellant's first assignment of error is that the court erred in overruling defendant's first special exception, viz: "To all that portion of plaintiff's third amended original petition which alleges another consideration for the sale of the 83 20-100 acres of land than the consideration expressed in the deed itself; because plaintiff alleges no accident, fraud, or mistake in the execution or delivery of the deed, and because it clearly appears from plaintiff's allegations that he was fully cognizant of the exact wording and framing of the deed of conveyance; that he and defendant's agent W. D. Wylie clearly understood the exact language and meaning of the deed, but agreed between themselves, for purpose of convenience, to interpret it differently from its plain and unambiguous meaning; and for further reason, under this special exception, defendant says the contract, as set out in plaintiff's said petition, and alleged as contemporaneous and as a part of said contract of sale, does not imply that the location of defendant's depot was any part of the consideration for conveyance of said land."

The general rule is well understood that a parol agreement cannot be ingrafted upon a written contract clear in its terms, in the absence of fraud, accident, or mistake. *Bruner v.*

Plaintiff's  
right to show  
consideration  
—Sufficiency  
of allegations.

Strong, 61 Tex. 557; Galveston, H. & S. A. R. Co. v. Pfeuffer, 56 Tex. 67, 11 Am. & Eng. R. Cas. 373; East Line & R. R. Co. v. Garrett, 52 Tex. 137. The exceptions to the rule are as familiar as the rule itself, namely, that a deed absolute on its face may be shown to be a mortgage or a trust, and that the consideration in a deed is not properly stated. Gibson v. Fifer, 21 Tex. 261; Galveston, H. & S. A. R. Co. v. Pfeuffer, 56 Tex. 66, 11 Am. & Eng. R. Cas. 373. But in the case of East Line & R. R. Co. v. Garrett, 52 Tex. 137, where the deed to the railway company for right of way recited a consideration of one dollar paid, "and the further consideration that the said company will locate its railroad over my land situated in Marian county," it was held by our supreme court that an additional consideration that the company was to erect its depot on the grantor's land could not be proved, in the absence of fraud, accident, or mistake. The court say: "As this deed was executed by plaintiff, and accepted by defendant, this recital is more than a bare receipt of the payment of the purchase money; it is also the written evidence of a contract between the parties that the plaintiff would grant the right of way, and that the defendant would construct its road over the same." The decision seems to hold that a parol undertaking on the part of the company to establish a depot on the grantor's land, made contemporaneously with the deed and not expressed therein, could not be established, in the absence of fraud, because it would ingraft upon the deed by parol conditions not expressed therein. Fraud, of course, would vitiate any transaction, however solemnly it may have been executed, but in this case the court below ignored the allegations and evidence of fraud on the part of the company and its agent, and submitted the case to the jury upon other issues not dependent upon the alleged fraud, and hence the case must now be considered as if there was no attempt to allege or prove fraud. We must take the allegations and the evidence stripped of fraud, and in such case it is not necessary to decide whether the allegations of fraud are sufficient or not; that is, if our conclusion is correct upon another branch of the case.

It is clearly to be inferred from the instrument of writing, executed at the same time the deed was executed, that these instruments did not evidence the entire contract, or all the contracts, entered into between the parties. It is apparent from the written instrument that there was some obligation on the part of the company to locate its depot and a town site on some of the land obtained from plaintiff, or at least between sections 1670 and 1678, on the line of the road, which would be on the land conveyed by plaintiff. The in-

strument recites: "In consideration of the purchase of land from me for the location of a town site, and the location of a depot at a point between stations 1670 and 1678 on the located line of the Gulf, Colorado & Santa Fe Railway, running northeast to Red River," etc. Defendant claims the Montgomery three acres under this agreement. If the language quoted does not bind the company to place its depot at a point between the sections named, it does indicate that there is some understood agreement between it and Jones that required it to do so. The contract in writing was not made merely because the company had purchased land of Jones, but purchased for the purpose of locating a town site and a depot thereon. The agreement indicated was not required to be in writing so far as the company's obligation was concerned; it might have been made by parol. The surrounding facts established by plaintiff show definitely what the agreement was, and upon what consideration the company obligated itself. If the written instrument itself, and the undertakings of Jones therein, stated a sufficient consideration to bind defendant, none other need be shown to maintain this action. The writer is of opinion, however, that the writing was not intended to do this. It does nothing more than to refer to the contract to locate the depot; to recognize it, without giving its details, as a predicate or consideration for the undertakings of Jones. We think that the facts alleged by plaintiff setting up the written instrument, the contract of defendant company to locate its depot at the point named, the terms and consideration of the contract, the same being a distinct obligation recognized, but not attempted to be defined, in the writings between the parties, were properly alleged, and that in such case it was not necessary to allege fraud. *Thomas v. Hammond*, 47 Tex. 52. It is not necessary to consider every question raised as to the admissibility of evidence tending to establish the foregoing allegations. Such evidence, though in parol, would be admissible.

The second assignment of error is as follows: "The court erred, as set out in defendant's bill of exceptions 1, 2, 3, 4, 5, 7, and as incorporated in defendant's motion for new trial, in permitting plaintiff and his witnesses to testify, over objection of defendant, as to conversations and parol agreements between W. D. Wylie and plaintiff, previous to the final contract entered into, and which was evidenced by the deed to the 83 20-100 acres, and the alleged contemporaneous written instrument, because the deed and said written instrument, covering, as they did, all the matters in controversy, would represent the final conclusion of the parties, irrespective of

mere conversations or verbal agreements made or entered into many weeks beforehand, and because, further, the alleged silent or verbal understanding as to gift of 22 acres of land was contradictory to the plain recitals of the deed, and the alleged verbal understanding with respect to location of station at 1674 was contradictory of the written contract, and said W. D. Wylie had no authority, as right of way agent or otherwise, to bind defendant as to location of station at said point, or any other point. Defendant, for further reason under this assignment, upon the question of ratification of the verbal acts or representations of said Wylie with respect to depot location, says there was no evidence as to defendant's knowledge thereof, or action upon same, but the evidence was defendant relied only upon the plain, unambiguous recitals in the deed to the 83 20-100 acres, and the written contract alleged as contemporaneous."

The greater part of this assignment has been disposed of by the conclusion reached above, upon the sufficiency of the allegations in the petition. The question as to Wylie's authority to bind defendant by an agreement to locate the depot, and that of proof to support ratification, must be noticed. The evidence adduced by defendant was positive that Wylie had no such authority, but there was evidence to the contrary, showing that he had or at least used such power with the consent of the company, and that he had special power in this particular case. Pickett, employed under Wylie to secure right of way, says: "I do not know that Col. Wylie had authority to select depot grounds. I procured such land for the right of way and for depot grounds as he ordered me to get. I know something of the defendant's obtaining depot grounds of Wylie. I bought for defendant, under Col. Wylie's instructions, 110 acres of land for depot purposes at that place, and the depot was afterwards established on the land. Col. Wylie was the main right of way agent from Dallas to Paris." It was proved that he procured the deed and paid the purchase money for the depot at Sachse, but in this case the engineer had previously laid off the town.

Rike, a witness to the "instrument in writing," testified that Wylie "seemed to be engaged in locating depots. I know about the location of the depot at Merit. Col. Wylie and myself went up there to see some men who lived in Merit, and some who lived in Hunt county, and the different men were there, and were talking to him about locating the depot. At that time Wylie made a proposition to Dr. Murchison about getting the right of way, and if they would do as he wanted Merit would get the depot." It was shown

Authority of  
agent to  
locate depot.

that he conducted the negotiations for the company in the rivalry for the depot between old Copeville and the place finally selected.

Pickett testified that he was present on the 2d day of June, when Jones and Wylie were negotiating about the twenty-two or twenty-five acres of land. He says: "In his conversation Jones agreed to give the company twenty-five acres of his land, but the company required some of Montgomery's land. Wylie then said, that the company wanted twenty-two acres off Jones' land and three acres off Montgomery's. Jones then agreed to give the company twenty-two acres, and to furnish the money to pay for the Montgomery three acres of land. The company was to place the depot on the land of Jones. While under a shade tree talking about the matter, a telegram to Wylie was produced. Wylie read the telegram, and said it was from Col. Snyder, the general manager of the road, and stated that he (Snyder) stated in the telegram that if Jones did not give the twenty-five acres they would not locate the depot on his land, but would run from Farmersville to Wylie. I read the telegram myself, and am satisfied that it was signed by Webster Snyder. Jones then gave Wylie \$120 or \$125 to procure the land from Montgomery. We were then sitting where the railroad crosses the dirt road on Jones' land, and it was said that the depot should be placed at that point, seventy-five feet south of where we were then sitting.

On cross examination, he stated further: "I said I was positive that the telegram was signed by Webster Snyder. It seemed to me that the object of the telegram was to hurry up Jones in making the contract. It was the business of the engineer to survey the depot ground." The evidence, as to contents of this telegram, was objected to, because it was not the best evidence, and a bill of exceptions taken; but the question is not raised by any assignment of error, appellant relying upon the inadequacy of the proof.

Wylie emphatically denied that he had authority to select depot ground; said he accepted the deed for the 84 acres just as it was written; had no authority to accept a conditional deed, and told Jones so. He produced what special authority he said he had,—two telegrams from Snyder,—as follows: "Your yesterday's letter here. Buy the 100 acres at Copeville, 25 per acre, if you think prospects warrant." And the other: "Buy the Copeville 100 acres at 25. Do the best you can with the Merit people." Both telegrams addressed to Wylie at Dallas. Wylie testified: "If I stated to Howard Pickett that I had received a telegram from Mr. Snyder notifying me that I must not make a deal with Jones till he gave

25 acres of land, it unquestionably must be so. I don't remember any such thing. If I received such a telegram, I don't know where it is. Jones gave me money with which to make a tender to Montgomery for suitable grounds. I told Jones that the location must be dependent upon grade, and that the grade on his land was such that we would have to run back on Montgomery." He says further: "I never had anything to do with exact location of depot. The engineers invariably did the locating." On the 2d day of June, the day on which plaintiff contends that the agreement was made to locate the depot on his 22 acres of land, Wylie wrote the following letter to Hill, one of defendant's engineers, which was handed to Jones to deliver to Hill, and plaintiff testifies he did deliver it as requested, and that Hill at once handed him back the letter: "Farmersville, Texas, June 2. Col. Hill: I am sorry I missed you this morning. If you can get time this week, Col., I would be obliged if you will run out the depot grounds at Jones' place. Our contract with Mr. Jones is that we get 25 acres of land, which includes about three acres in Montgomery's land, from station 1670, Jones' land, back to station 1657, which gives us the twenty-five acres contended for from station 1670 to 1688, 316 feet on each side, exclusive of the right of way, and the 13 stations on Montgomery of additional hundred feet would make the 25 acres. I would like, at least, to have the twenty-five acres run, in order to get the deed made out. If you think of any better way to lay it out, do so, as I only want the field-notes to put into the deed. I will return here by next Tuesday, and will hunt you up. Sincerely yours, W. D. WYLIE, R. Way Agt. G., C. & S. F. P. S. I was too late for church on Sunday, and made satisfactory apologies."

Webster Snyder's testimony denied that Wylie had any authority to locate depots. He says: "Wylie did not locate any stations on defendant's line. The stations were located by the assistant chief engineer, and approved by me. Col. Wylie had nothing whatever to do with the depot grounds, except to buy them after they were located, if instructed to do so. He has, under instructions from me, purchased town-sites at several places, but he never had authority to include any obligation of any character in the deed, or to make any supplemental outside agreement in addition thereto. \* \* \* Wylie's relation towards the right of way was that of advising and assisting to the citizens' committee. \* \* \* The company had an agreement with Mr. Sachse, prior to Wylie's employment, to receive from him free right of way and depot grounds. Wylie, after his employment, was sent to close the transaction and get the papers in shape."

The evidence need not be further recited. Enough of it has been stated to put us in possession of the most important facts, and to show that the jury may have correctly construed it in finding that Wylie had authority to locate the depot as agreed with Jones. The telegram from Snyder is the most direct evidence of special authority in this particular case, and would, of itself, support the finding. Other evidence tends to show that he was recognized by the company as its agent with such power, and was permitted by it to exercise such power. Persons so dealing with him might do so with confidence that he was duly authorized. Anyhow, it is safe to conclude that he was specially authorized in this case. As to ratification by the company, with knowledge of the facts, we think the evidence sufficient to show it. Snyder must have known of his own telegram to Wylie requiring Jones to give 25 acres of land to secure the depot; the written instrument executed at the time of the deed gave notice of the fact. It was sent to the general manager with the deed about the time it was executed, and the copy of it used in evidence was made, and sent to Jones by Mr. Davis, the company's secretary at Galveston. The company was charged with the knowledge of it. The first material hauled by defendant to build the depot was unloaded near 1,674, but was afterwards moved onto the Montgomery land. We do not think there was error if the jury based their verdict upon a ratification.

We are asked to reverse the judgment because the verdict was excessive on the question of damages. Plaintiff owned 1,380 acres of land in a body, including the land conveyed to defendant, and he testified that, "if the company had located its depot where it agreed, my tract of land would have been worth three or four dollars per acre more than it is now." E. E. Blount testified to the same fact. Bowen testified that it would have been worth four or five dollars per acre more, and that, "if the depot had been located at the edge of the land of the plaintiff or at station 1670, I would still say that the remainder of the land of plaintiff would have been worth five dollars per acre more than it is now worth." While defendant's evidence on this point shows that the damage was very little or nothing, it will be seen that there is nothing more than a conflict of evidence, in which case it has often been decided that an appellate court cannot interfere, the jury having decided the question, and the trial judge having overruled the motion for a new trial.

On the trial, John Church, one of plaintiff's attorneys, was permitted to testify, over objection of defendant: "I knew Waters S. Davis, of Galveston. He was secretary of defend-

**Verdict not excessive.**

ant company. His office was in Galveston. I presented him with a petition for change of name of depot at Copeville. He referred me to Col. Snyder, and upon going to Snyder he referred me to Col. Wylie. Wylie reported it." The court, in approving the bill of exceptions to the evidence, states that the evidence was only admitted as bearing upon the question of Wylie's agency. It was a slight circumstance, but for the purpose named it was admissible for what it was worth.

Finding no error in the rulings of the court as assigned, we conclude the judgment of the court below should be affirmed.

STAYTON, C. J.—Affirmed, as per report of the commission of appeals.

**Agreements to Locate Stations.**—This subject is exhaustively considered in the note to *Township of Nottawasaga v. Hamilton etc. R. Co.*, 38 Am. & Eng. R. Cas. 711-718.

**Parcel Agreement to Convey Land for Railroad—Part Performance—Erection of Station etc.**—In *Hayes v. Kansas City, Ft. S. & G. R. Co.* (Mo. March 2, 1892) 18 S. W. Rep. 1115, it was held that where a land owner verbally agrees to convey land to a railroad company, on condition that the company will construct a side track thereon, and erect station buildings on adjoining land, evidence that the company erected the station buildings, as agreed, constructed the track on part of the land, used the rest as a roadway, and spent several hundred dollars in grading and macadamizing it, warrants a finding that the contract was sufficiently performed to take it out of the statute of frauds. The court said: "A verbal contract for the sale of land, and nothing more, is as nothing. It has no binding force whatever, because of the statute of frauds. If one can show, however, a taking possession of land, making valuable and lasting improvements thereon, exercising exclusive possession and ownership thereof, all with the knowledge and consent of the owner, and which can be referred to and explained by a verbal contract, established by clear and satisfactory evidence, then, in such case, to prevent fraud and injustice, courts of equity will decree a specific performance of the verbal contract. *Emmel v. Hayes*, 102 Mo. 186, and authorities cited. Under the declaration of law given in this case, and the finding and decree thereunder, the court was bound to have found that a verbal contract was clearly established; that possession was taken and improvements made thereunder; and that all were done with the knowledge and consent of plaintiff. It is true, the evidence does not show an exclusive possession by defendants to the strip of land between the tracks, but it shows a possession and use of it as a roadway, and its improvement as such, which was the only use to which defendant wished to apply it, and which was wholly inconsistent with any proprietorship on the part of plaintiff. It must also be remembered that the verbal contract, as the evidence tended to prove it, included the land upon which the south side track was afterwards laid, and constructing that track is a part performance and an act of possession and ownership which the court had a right to, and doubtless did consider."

**Verbal Agreement Concerning Conveyance of Right of Way—Action to Reform Deed.**—In *Mead v. Norfolk & W. R. Co.* (Va. July 7, 1892) 15 S. E. Rep. 497, it was held that a conveyance of a right of way to a railroad company will not be canceled or reformed because of the existence of a verbal agreement between the parties that a trestle, with a roadway thereunder, should be built across a ravine on the grantor's farm, which agree-



ment was not inserted in the conveyance, because deemed unnecessary by the parties. The fact that the attorney of the company who dictated the deed, and their right of way agent, who was present, said that it was unnecessary to insert the agreement, was no ground for cancellation, it having been shown that they were without authority to bind the company in the premises. The court said: "The case is in all essential particulars like that of *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, in which case the rule respecting the reformation of written instruments, and their cancellation on the ground of fraud, was fully stated, and the authorities cited. What was there said is decisive of the present case, and need not be repeated."

**Deed Procured for Railroad Company by Agent—*Res Gestae*.**—When a railroad company has taken the benefit of a deed made to it, the sayings of the person who procured the deed in its behalf, made at the time the deed was executed, to the effect that he was acting as agent for the company, are admissible in evidence as a part of the *res gestae*. *Chattanooga R. & C. R. Co. v. Davis* (Ga. Aug. 1, 1892) 15 S. E. Rep. 626.

**Conditions in Deed Obtained by Construction Company—Duty of Railroad Company.**—Whether a chartered railroad company procures its right of way directly, by its own contracts, or indirectly, through the intervention of a construction company employed by it, it is bound to perform all the conditions and undertakings inserted in deeds made to it, conveying the right of way, provided it operates and uses its railroad on and over the premises to which such conveyances apply; and a delivery of a deed to the construction company is delivery to the railroad company, if the latter company has taken and enjoyed the benefits of such deed by appropriating and using the right of way which the deed in express terms conveys directly to the railroad company. *Chattanooga, R. & C. R. Co. v. Davis* (Ga. Aug. 1, 1892) 15 S. E. Rep. 626.

**Sale of Superfluous Lands by Railroad Company—Covenant to Resell Portion.**—A railway company sold to a purchaser for a lump sum a plot of land which was not required by them for the purposes of their undertaking. The conveyance contained a covenant by the purchaser to resell a certain defined portion of such land to the company whenever he might be required by them to do so:—*Held*, that although such covenant to resell, being in contravention of § 127 of the Lands Clauses Consolidation Act, vitiated the sale of the portion of the land to which the covenant related, it did not affect the validity of the sale of the other portion. *Ray v. Walker* (1892) 2 Q. B. 88.

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## ROANOKE INVESTMENT CO.

v.

## KANSAS CITY & SOUTHEASTERN R. CO.

(*Missouri Supreme Court, Division No. 2, Dec. 2, 1891.*)

**Right of Way—Abandonment of Easement—Adverse Possession.**—The mere non-user of a right of way granted to a railroad company will not extinguish the easement where there is no adverse possession or where there are no acts on the part of the railroad company from which an abandonment can be clearly inferred.

**Grant of Right of Way—Condition Subsequent—Failure to Build Bridge.**—That portion of a contract granting a right of way to a railroad company

relating to the agreement of the company to build certain bridges for the grantor, bridges *held* not a condition subsequent, failure to perform which would forfeit the grant.

**Same—Abandonment—Reversion to Owner.**—A right of way was conveyed to a railroad company and its assigns forever, "so long as the said land hereby conveyed shall be used for railroad purposes." The roadbed was graded but the successor of the grantee completed the road by a new route. The owner of the tract occupied the right of way for five years after the completion of the road by the new route, and put valuable improvements upon it without objection from the railroad company. *Held*, that the right of way was abandoned, and reverted to the owner of the tract of which it was originally a part.

APPEAL from Jackson Circuit Court.

*Johnson & Lucas* and *C. O. Tichenor*, for appellant.

*Dobson, McCune & Doggett* and *Trimble & Braley*, for respondent.

GANTT, P. J.—This is a civil action to perpetually enjoin the Kansas City & Southeastern Railroad Company from entering, building, and operating a railroad through 92.3 acres in the N. E. 1-4 of section 19, township 49, range 33, in Jackson county, Mo. The plaintiff is a business corporation organized under the laws of this state, and the defendant is a railroad corporation organized under the laws of this state also, and its owners. Plaintiff had laid off the lands into town lots, streets, and blocks as an addition to Kansas City. It charges that the defendant is about, wrongfully, illegally, and without plaintiff's consent, to enter upon these lands, build and excavate a roadbed for a railroad, and appropriate a right of way across said lands, in violation of the constitution, and to the irreparable damage of plaintiff. The answer of the defendant is (1) a general denial, and (2) that it is the owner and entitled to the possession of a right of way for a railroad through, over, and across the lands described in the petition of the width of 100 feet, and is the owner and entitled to the possession of a graded roadbed for a railroad, situated on said right of way. and was such owner, and so entitled to the possession of said right of way and graded roadbed, at the time of the filing of the petition in this cause, and ever since has been. To this plaintiff replied: (1) Denying defendant was the owner of the right of way; (2) that plaintiff, and those under whom it claimed, had been in the open, notorious, peaceable, continuous, and adverse possession of said lands, including the right of way, for 13 years next preceding the commencement of this suit; (3) that defendant, and those persons under whom it claimed title to the alleged right of way and roadbed, have long since wholly lost right to the possession

and use of said right of way and roadbed by abandonment, if it or they ever had such right. These facts were developed upon the trial in the circuit court.

On the 14th day of August, 1871, "the Kansas City, Memphis & Mobile Railroad Company was organized under the laws of this state." At that time, and for many years previous thereto, and until the year 1873, A. B. H. McGee was the owner of the 92-acre tract of land described in the petition. In 1873 McGee conveyed by deed to Kansas City, Memphis & Mobile Railroad Company the right of way through the lands in question. That conveyance was never recorded, and appears to have been lost, but McGee is positive that he delivered such a deed. When shown another deed to other lands by himself and wife to the same company for a right of way, he testified: "They were worded the same, because the same man wrote them both, I think." The deed shown him was the ordinary form of "grant, bargain and sell," with a limitation in the *habendum* clause as follows: "Unto said party of the second part [the defendant herein] and its assigns forever [meaning thereby] so long as the said land hereby conveyed shall be used for railroad purposes." McGee testified the railroad company paid him \$5,000 in money and agreed to build him two bridges over the cut made by the road through his land. The deed was executed and delivered about the month of October, 1873. The road ran about three-fourths of a mile through this land. The cut was thirty feet deep a portion of the way, and a heavy fill the remainder. McGee testifies that the road was about half constructed through his land when he made the deed. He put up fences inclosing this right of way with his pasture before he executed the deed. The railroad company expended about \$20,000 on this tract and completed the roadbed some time in 1874. On 4th of February, 1876, the railroad company was adjudged a bankrupt, and Turner A. Gill, Gardner Lathrop and Henry Flannagan were duly elected and confirmed assignees. Under an order and judgment of the United States district court for the western district of Missouri, the bed, masonry, right of way and appurtenances of said railroad were sold by said assignees to John D. Bancroft for \$15,025, and a deed duly executed April 25, 1877. It appears that the county of Jackson had subscribed and paid to said company, \$300,000, and the merchants of Kansas City were greatly interested in the building of the road. Accordingly April 2, 1877, Bancroft made a deed to Thomas K. Hanna, Benjamin McLean and John D. Bancroft, in trust for themselves and their associates, business and professional men of Kansas City, January 13, 1880, Hanna, McLean and

Bancroft, in execution of their trust, conveyed to James I. Brooks all of said property. On the 27th of February, 1880, Brooks conveyed all the property he had thus acquired to the Kansas City and Southern Construction Company. On the 10th of June, 1880, the Kansas City and Southeastern Railway Company was organized and received its certificate of incorporation from the state of Missouri. On the 18th September, 1880, the Kansas City and Southern Construction Company conveyed all of the road bed, franchises, etc., to the Kansas City & Southeastern Railway Company; and on the 15th day of December, Hanna, McLean and Bancroft also remised, released and quitclaimed to the last named railroad all the rights they held for themselves and their associates. During the period of bankruptcy the various owners of this railroad and right of way were unable to finish their road and all work was stopped. On May 25, 1882, McGee conveyed the 92-acre tract to the Kansas City Interstate Fair for \$425 per acre. The fair company took possession of the whole tract, including the right of way involved in this action; constructed a race track across this right of way in two places; built stables, amphitheater and other improvements. William R. Bernard testified he was one of the judges of the county court of Jackson county, and knew that Jackson county spent \$300,000 on that grade; that it was completed October 27, 1874. He also testified that he knew of McGee fencing this tract. He was also a director and superintendent of the fair association. In its behalf he took possession after McGee deeded them the tract. He knew McGee had received the purchase money for this land prior to the fair association buying and taking possession, and knew McGee had conveyed it from conversations with McGee. On 2d July, 1887, the Kansas City Interstate Fair conveyed the 92.3 acres to Roanoke Investment Company. The deed so made contained this clause: "The east thirty (30) feet of land off the east side of the tract herein described, being conveyed subject to the rights of the public therein for highway purposes, excepting from the covenants expressed and implied herein the right of way through said land for railway purposes, if any such exist, of the Kansas City, Memphis & Mobile Railroad Company, and those claiming through or under it." Mr. A. A. Whipple, who was the promoter of the scheme to organize the plaintiff corporation, and it seems the general manager of its affairs after organized, testified that he had been familiar with the cut through McGee's land for at least thirteen years. After his company bought he had a conversation with John I. Blair, who was the chief owner of the Kansas City and Southeastern Railway. Blair told him

he was going to utilize the right of way, and Whipple says "We had some kind of agreement for a while." This witness produced the contract between the fair association and S. T. Whipple & Co., agents for a corporation thereafter to be formed, and afterwards the plaintiff herein. This contract was for the 128 acres (including the 92.3 sold to the fair by McGee), less five acres, the right of way of the railroad through the same, known as the "Blair right of way," which is to be conveyed by sellers to buyers by "quitclaim, at a nominal consideration." These words, the bill of exceptions recites, had a pencil mark drawn through them. In explanation of this clause Mr. Whipple testified, "They made us a six acre reduction." On re-examination by his counsel, he said: "We bought the right of way and supposed we had a good title. We knew that McGee had made a deed to it. The capital stock of the Roanoke Investment Company is \$500,000. We, my brother and I, own \$500 less than one-half of the whole. We knew the railroad company was claiming the right of way. We knew they were going to try to get it if they could." The evidence also showed that the fair association, during its occupancy of the ninety-two acres, built a race track across the right of way at two places, and McGee rolled some large stones back into the cut prior to selling the land to the fair association.

The circuit court rendered the following decree: "The court, being fully advised in the premises, doth find, all and singular, the facts stated in plaintiff's petition to be true, as therein alleged, except as to the adverse possession therein claimed, which said adverse possession the court finds only began in the early part of the year A. D. 1882, and has continued in the manner charged until this date, and plaintiff is now in the enjoyment of such possession; and doth further find that the right of way for a railroad and roadbed claimed by the defendant Kansas City & Southeastern Railroad Company in its answer, was created and granted by deed of one McGee in A. D. 1871, who was then the owner of the lands described in the petition; that said deed created and granted a mere easement over said lands to be used for the purpose of a railroad; that plaintiff has not acquired the title to said strip of land by adverse possession of itself, and those under whom it claims, but that long prior to the institution of this suit, said easement had been abandoned, and all right to use the same for a railroad had thereby been lost and extinguished. It is therefore by the court considered, ordered, adjudged and decreed that the temporary restraining order heretofore granted in this cause be made perpetual, and that defendants, and each of them, their respective servants,

agents and employes be, and they are and each of them is hereby perpetually enjoined and restrained from, in any manner, attempting to excavate, grade or construct a road-bed for a railroad, and from attempting to build, construct or operate, and from building, constructing or operating a railroad on, over or across the following lands, or any part thereof, until they have acquired the right to do so in the manner required by law." From this decree the defendant alone appeals.

The issues are clear and well defined. The plaintiff claims the right of way by virtue of deeds from McGee and the Kansas City Interstate Fair. Prior to the execution and delivery of these deeds, McGee had already conveyed this right of way to the Kansas City, Memphis & Mobile Railroad Company, and that company had taken possession and excavated the cut and made the fill through this land at a cost of \$20,000. Of the execution of this deed, and the construction of this road-bed, both the Kansas City Interstate Fair and the promoters of the plaintiff corporation had actual and ample notice. Hence plaintiff's title by deed is subject to the easement acquired by said railroad, as the conveyances to defendant carry all the title acquired by the Kansas City, Memphis & Mobile Railroad Company, unless this easement has been lost by some act or acts of the said railroad and its successors. Guarding itself against this view, plaintiff claimed title by adverse possession of the premises in dispute. The circuit court found, very properly, there was no adverse possession until 1882, when the fair company fenced the right of way and took possession. As the proceeding was instituted November 2, 1887, only five years after such possession was shown, of course plaintiff failed on this claim. *Wilkinson v. Thompson*, 82 Mo. 317; *Gordon v. Eans*, 97 Mo. 603.

Claim of adverse possession.

This brings us to the real point in the case. The circuit court found that defendant, and those through whom it claims, in 1871, acquired an easement over these lands to be used as a right of way for a railroad; that this easement was created and granted by deed from McGee, the then owner; that this easement had been abandoned by those under whom defendant claimed, and was consequently extinguished. As this is a strictly equitable proceeding, we are required to examine the evidence to determine whether the circuit court properly found this fact.

Abandonment of easement by defendant.

The facts upon which plaintiff relies to show an abandonment of this easement are as follows: First, there was a non-user from 1874 to 1887. Now, it is clear that, after completing

this cut and other costly work in the immediate neighborhood, the railroad company was declared a bankrupt, and no track was laid or trains run over this road until just previous to the commencement of this suit, when the defendant, having laid its track on the roadbed some five miles south of this track, was preparing to complete it into the city. It is equally clear that no one else had occupied or used this right of way in any manner until the Kansas City Interstate Fair built its race track across it in two places. So that, as to this immediate part of the railroad, we have a non-user by the company or owners for 13 years, and an actual use by the owner of the lands through which it ran, by building and using the two tracks across it, from 1882 to 1887. Does such a non-user of itself work such an abandonment as will forfeit the right? In the decision of this question it is essential to remark that the courts in England and in the different states of the Union have almost invariably made a distinction between easements acquired by deed and those acquired by prescription. It is generally held that, "if the easement has been acquired by deed, no length of time of mere non-user will operate to impair or defeat the right." "Nothing short of a use by the owner of the premises over which it was granted, which is adverse to the enjoyment of such easement by the owner thereof for the space of time long enough to create a prescriptive right, will destroy the right granted." Washb. Easem. (3d. Ed.) chap. 5, § 6, pp. 670, 671, and cases cited marg. pp. 551-559; Curran v. Louisville, 83 Ky. 628; Chandler v. Jamaica Pond, etc., Corp., 125 Mass. 549; Welsh v. Taylor, (Sup.) 2 N. Y. Supp. 815, and cases cited. Whether the distinction between easements acquired by grant and those acquired by user alone should be made, it is unnecessary to decide. We hold that the mere non-user of this piece of road, in the absence of adverse possession by the servient owner, or other acts of such unequivocal nature on the part of the owners of the railroad as evinced a clear intention to abandon the easement, would not work an extinguishment of the right, however acquired.

2. It is next insisted that, as McGee testified that the Kansas City, Memphis & Mobile Railroad Company agreed that, in addition to the \$5,000 it paid him for the right of way, it would build him two bridges, and as neither said railroad nor any one of its successors have built said bridges, the non-fulfilment of this agreement would defeat the estate; and the fact that defendants, and those under whom they claim, failed to do what was necessary to prevent the estate reverting, tends to show an intention to abandon. McGee testified as to these

Effect of failure to build bridges.

bridges: "They were to build a double track bridge; that was part of the contract." "This I considered a contract, and they were to build two double-track bridges across that cut,—one in the deepest place, and one where the county road strikes it." "That was the words of the contract." "It was a part of the contract that they were to build these bridges, immediately after the roadbed was finished, so they could put them in." According to this, these bridges were not to be built, until the work was finished. All that can be definitely ascertained about these bridges from this is they were to be double track bridges, and located across the cut,—one at the deepest place; the other where the county road crosses. Was this portion of the contract such a condition as its breach would forfeit the estate. "Conditions subsequent are not favored in law, and are construed strictly because they tend to destroy estates." Co. Litt. 205*b*, 219*b*. "If it be doubtful whether a clause in a deed is a condition or a covenant, the courts will incline against the condition, for a covenant is far preferable." 4 Kent, Comm. 132. The usual words in a condition subsequent are "so that," "provided," the latter, according to Lord Coke, being the most appropriate. Applying this rule to this case, none of the usual words of a condition are found, nor is there in McGee's evidence anything that would support the view that he ever told the officers of the railroad that a failure to build these bridges would forfeit the grant, for which they had paid him \$5,000. Such a construction is contrary to "good sense and sound equity." We hold these words did not create a condition subsequent in law, and a mere failure to build these bridges would not cause a reverting of this estate. *Chapin v. School Dist. No. 2*, 35 N. H. 445.

But, while it is true that mere non-user will not amount to an abandonment, it is well settled that an easement acquired by grant or its equivalent may be lost by abandonment. To constitute an abandonment of an easement, acquired by grant, acts must be shown of such an unequivocal nature as to indicate a clear intention to abandon. *Curran v. Louisville*, 83 Ky. 628; *Dyer v. Sanford*, 9 Metc. (Mass.) 395; *Hayford v. Spokesfield*, 100 Mass. 491. It is said, however, that abandonment will be more readily inferred when the easement was granted for public purposes than when it was created for private use. The easement acquired by McGee was for a public use,—a highway. This right of way was acquired by a railroad company, authorized by its charter to run a railroad from Kansas City, in Jackson county, southeasterly through Cass, Henry, St. Clair, Greene, to the southern boundary of Mis-

Evidence to  
show aban-  
donment.



souri. After acquiring this right of way, the roadbed was excavated, and the grade established; no track was ever laid upon it. In 1874 the company was declared and adjudged a bankrupt. The roadbed and property were all sold to a number of merchants and professional gentlemen of Kansas City, and a deed was made to Messrs. T. K. Hanna, McLean, and Bancroft, as trustees, for the party who had made the purchase. These gentlemen, being greatly interested in the welfare of Kansas City, were anxious to establish a railroad to the southeast, to open the markets of the south to her merchants. They made several efforts which failed. Finally, in December, 1880, they made a deed of release to the Kansas City & Eastern Railway Company. E. L. Martin, of Kansas City, was named as one of the directors of the Kansas City & Eastern. The contract of the trustees, Hanna, McLean, and Bancroft, with this last-named railroad, provided for the expenditure of "\$25,000 on the estimates and orders made and given in the building of such railroad, by the chief engineer of said company," before July 1, 1881, and upon the expenditure of that sum and \$15,000 more before October 1, 1881, then the trustees were to release all claims to the road to said company." The evidence is conclusive that when this new company began to work on the road, instead of utilizing this old right of way, it adopted a new route, procured a new right of way, and constructed a railroad from Kansas City to Clinton, Mo. No use whatever was made of the right of way through McGee's lands. Under these circumstances, McGee sold the whole tract to the Kansas City Interstate Fair for a fair ground and race course. The fair expended \$115,000 to \$120,000 in improvements on these grounds. Among other things was the erection and construction of a race track, which brought within its limits a portion of the railroad excavation, crossing at the south and again near the north end, making two crossings, of the right of way, and including about nine to eleven hundred feet of the railroad within the limits of the race track. The fair association occupied these lands, and maintained these obstructions across this right of way, until 1887. Mr. Payne and Judge Bernard both testify that, while these improvements were being constructed, no one for the railroad made any objection or adverse claim to the premises. They held five fairs on the grounds, and then sold to the plaintiff. When the Kansas City & Eastern began to build, the citizens of Westport, learning that the company was constructing its road by way of the east bottoms and the Blue river, held a meeting. It was then understood that the Kansas City & Southern Company were going to abandon the route through this land and

Westport, and build through the east bottoms. This meeting appointed Judge Cowan, George N. Nolan, and Judge Bernard to confer with the company, and induce it not to abandon the old route. This committee "met the company in Kansas City where it had headquarters, and offered all the inducements it could to have the company adopt the Westport route. The chief engineer was called. He took the profile, and endeavored to show the committee that the Westport route was impracticable, and "finally told them they couldn't do it." "The grade was too heavy." The intention to abandon that route was clear at that time. But the intention to abandon was not allowed to rest upon the declarations of the officers. The company went to work, and graded its road into Kansas City over a different route, as it had declared it would do. It would be very hard to conceive of more positive, unequivocal evidence of an intention to do an act than occurred in this case. But the evidence of abandonment does not rest upon the non-user for 13 years; the actual diversion of the road from this route; upon the clearly expressed intention to abandon; and standing by five or six years while the fair company was expending immense sums of money in improvements upon this land, and actually filling up the cut, without protest. In addition to all this, the company signalizes its final abandonment by conveying the 11 miles of road, including the land in question, to another corporation organized to operate a railroad 11 miles in length,—a purpose not contemplated by either grantor or grantee when the right of way was granted. We think, when this was done, the intention to abandon, and the absolute abandonment were consummated, the easement was lost, and the lands in question became discharged of this burden. Acts so decisive and conclusive in character as these have but one meaning. They indicate and prove a clear intention to abandon the right of way. *Moore v. Rawson*, 3 Barn. & C. 332; *Liggins v. Inge*, 7 Bing. 682; *Louisville & N. R. Co. v. Covington*, 2 Bush. (Ky.) 526. It is not the policy of the law to permit a railroad to acquire a right of way to build a railroad, do some work on it and then, after changing its route, and abandoning the easement, still claim and exercise the right to sell the right of way to another. The statute permitting it to acquire land limits it for its own corporate purposes. It is not allowed to enter the market and speculate in real estate in this manner. When it ceases to use the land for the legitimate purposes indicated in its charter, the lands revert to their owner. Our conclusion is that the circuit court had abundant evidence to sustain its finding, and it becomes un-

necessary to discuss the other propositions in the very elaborate and satisfactory briefs filed by counsel on both sides.

Judgment of the circuit court is affirmed. All concur.

**Abandonment of Location or Right of Way.**—What constitutes a technical abandonment must depend upon the circumstances of the case. "No general rule of law, applicable to all cases, can be laid down, as to what change of a station will constitute an abandonment or relocation." *Attorney Gen'l v. Eastern R. Co.*, 137 Mass. 48. "Whether abandonment exists must depend upon the circumstances of the case." *Central Iowa R. Co. v. Moulton etc. R. Co.*, 57 Iowa 249. See also 40 Am. Dec. 464, note. Abandonment of the right of way may be presumed from non-user for ten years. *Henderson v. Central Pass. R. Co.*, 21 Fed. Rep. 358; 20 Am. & Eng. R. Cas. 542. Where a railroad without authority, leases its road it thereby abandons the operation of it. *State v. Atchison etc. R. Co.*, 24 Neb. 143; 32 Am. & Eng. R. Cas. 388.

The mere erection of structures for amusement on the land of a railroad, while such structures might be superfluous does not constitute an abandonment. *Prospect Park etc. R. Co. v. Williamson*, 91 N. Y. 552; 14 Am. & Eng. R. Cas. 34. A railroad is to be regarded as a unity, and so long as there is an intention to complete an uncompleted part there is no abandonment. *Central Iowa R. Co. v. Moulton etc. R. Co.*, 57 Iowa 249; 10 Am. & Eng. R. Cas. 138. A mere sale or transfer of the right of way to another company before the road is built does not constitute an abandonment. *Crolley v. Minneapolis etc. R. Co.*, 30 Minn. 541; 14 Am. & Eng. R. Cas. 47; *State v. Rives*, 5 Ired. (N. Car.) 297; *Henry v. Dubuque etc. R. Co.*, 2 Iowa 288; *Junction R. Co. v. Ruggles*, 7 Ohio St. 1; *Hatch v. Cincinnati etc. R. Co.*, 18 Ohio St. 93. Nor does a mere failure to run passenger cars operate as an abandonment where the road is regularly used for hauling freight, and the company is ready at all times to transport passengers for reasonable compensation. *Com. v. Fitchburg R. Co.*, 12 Gray (Mass.) 180. A company may lose its location by allowing another company to occupy and use the land included in it. *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105.

The effect of an abandonment of a location or right of way is that the company loses all its right thereto and the original owners may resume possession. *Hastings v. Burlington etc. R. Co.*, 38 Iowa 316; *Troy etc. R. Co. v. Boston etc. R. Co.*, 86 N. Y. 107; 7 Am. & Eng. R. Cas. 49; *Harrison v. Lexington etc. R. Co.*, 9 B. Mon. (Ky.) 470; *Great Cent. R. Co. v. Gulf etc. R. Co.*, 63 Tex. 529; 26 Am. & Eng. R. Cas., 114; *New York etc. R. Co. v. Boston etc. R. Co.*, 36 Conn. 196; *Fernow v. Chicago etc. R. Co.*, 75 Iowa 526; 36 Am. & Eng. R. Cas. 420; *Girard College etc. R. Co. v. Thirteenth etc. R. Co.*, 7 Phila. (Pa.) 620. In *St. Thomas v. Credit Valley R. Co.*, 12 Ont. App. Rep. 273, 36 Am. & Eng. R. Cas. 473, damages were allowed to a municipality where the railroad company by the abandonment of a station caused a decline in the value of property and a decrease of the tax receipts. But an injunction will not lie to restrain the removal of a depot by a company, thereby abandoning a part of its road. *Moore v. Brooklyn City R. Co.*, 108 N. Y. 98; 36 Am. & Eng. R. Cas. 76. Where a company has, by its charter, a right to use one of three routes, it cannot complain that one of those routes not adopted, or abandoned by it, was used by another company. *Louisville etc. R. Co. v. Louisville etc. R. Co.*, 2 Duv. (Ky.) 175. The abandonment of the whole road or a material part is ground for the forfeiture of the corporate rights and franchises. *State v. Atchison etc. R. Co.*, 24 Neb. 143; 32 Am. & Eng. R. Cas. 388; *Noll v. Dubuque etc. R. Co.*, 32 Iowa 66 (statute authorizing forfeiture for

such cause held constitutional); *Lake Erie etc. R. Co. v. Griffin*, 107 Ind. 464; 27 Am. & Eng. R. Cas. 394; *People v. Albany etc. R. Co.*, 24 N. Y. 26. (State cannot maintain an equitable action to compel a company to operate its road; remedy is by *mandamus*, *quo warranto*, or indictment); *Attorney-Gen'l v. West Wisconsin R. Co.*, 36 Wis. 466. In *People v. Northern R. Co.*, 53 Barb. (N. Y.) 98, it is said the law providing for the forfeiture of the charter of a railroad company which has suspended its ordinary and lawful business for more than a year, admits of no excuse for or explanation of such suspension.

A railroad corporation chartered to operate a road between A and B cannot legally operate only between A and C (a way station between A and B), and abandon the part of the route lying between C and B; and if it does so, its charter may be vacated, or its corporate existence annulled by proper proceedings. *People v. Albany etc. R. Co.*, 24 N. Y. 261.

A statute provided that in case any railroad company should not, within twelve months after the acceptance of the route by the commissioners, pay for a right of way over all the land covered by its location, such acceptance should be void. It was held that such failure to pay for the right of way was not in the nature of a forfeiture, to be taken advantage of only by the state in a direct proceeding against the company, but that the whole proceeding became of no effect upon the expiration of twelve months. *New York etc. R. Co. v. Boston etc. R. Co.*, 36 Conn. 196.

In *Durfee v. Peoria, D. & E. R. Co.* (Ill. March 26, 1892) 30 N. E. Rep. 686, it was held that where a railroad company, after condemning land for a right of way, and constructing its road thereon, leases a parallel line for 10 years, and ceases to use its own line, though with the intention of resuming such use at the expiration of said time, its taking up its track, and allowing its right of way to be fenced in by the owner of the adjoining land, and held by him during said 10 years, do not constitute an abandonment of its right of way. The court said: "It is conceded in the argument to constitute an abandonment there must be non-user and an intention to abandon. Here was non-user for a definite and fixed period of ten years, with no intention to abandon permanently the right of way, and we are aware of no authority under which it can be held the railroad company lost its right of way under such a state of facts. In *Barlow v. Chicago, R. I. & P. R. Co.*, 29 Iowa, 276, it was held that the railroad company did not lose its right of way from a failure to occupy the land acquired for that purpose for a period of thirteen years; and in *Columbus v. Columbus & S. R. Co.*, 37 Ind. 294, where the railroad company had entered into a contract with another company for the use of a part of its track, it was held that the taking up of the rails from a part of the track, and removing them to a new track, did not constitute an abandonment." See also as to abandonment by a railroad company of its tracks and right of way, note 10 Am. & Eng. R. Cas. 143; 14 *Id.* 51; 27 *Id.* 440.

**Abandonment of Part of Track by Railroad Company—When Petition Should be Granted.**—The petition of a railroad company, under Mich. Laws 1887, Act 275, for a decree to abandon and take up twelve miles of its track between Y and Z, and to abandon an intermediate station, should have been granted where it appeared that the petitioner had instituted proceedings to change its line in the manner prescribed by statute, and had presented a map and survey of the line to the state board, which approved the change; that one of the two branches of petitioner's line, as changed, would pass through Y., and the other through Z.; that the interests both of petitioner and of the general public would be subserved by the abandonment of the piece of road in question; that traffic over such piece of road did not, and never would, pay; and that its abandonment would seriously injure only those persons living three miles either way from the

intermediate station. *In re* Flint & P. M. R. Co. (Mich. April 8, 1892)  
51 N. W. Rep. 1001.

## CHICAGO, IOWA & DAKOTA R. CO. *et al.*

*v.*

CEDAR RAPIDS, IOWA FALLS & NORTHWESTERN R. CO. *et al.*

(*Iowa Supreme Court, Oct. 20, 1892.*)

**Right of Way—Appropriation by Another Company—Rule for Estimating Damages.**—Where a graded right of way and roadbed of one railroad company is crossed in several places by the road of another company, so that the first company contends that the second company has practically adopted its line and prevented the building of its road thereon, the damages to which the company owning such right of way is entitled are not to be based upon the rule that where a railroad company, in the exercise of the right of eminent domain, appropriates a part of a tract of land for a right of way it must compensate the land owner not only for the land actually taken, but for the depreciation in the value of the whole tract. That rule has no application to such a case.

**Same—Same—Damages for Advantage Gained.**—In such a case the company owning the right of way is entitled to damages for any advantage gained by the company crossing its line and appropriating part of its right of way.

**Same—Preventing Construction of Railroad—Amount of Damages Awarded.**—The evidence in this case does not support the contention of the company owning the right of way, that it was in a situation to proceed with the construction of its road and was only prevented because the defendant's road crossed its line several times; the court holds that \$5,000 is fully equal to any damages sustained.

### APPEAL from Tama District Court.

This is an action in equity and it involves the rights and liabilities of the respective parties to the right of way and grade of a railway from Belmond in Wright county to Forest City in Winnebago county. The plaintiffs claim that they were the owners of said right of way and grade, and that the defendants wantonly, maliciously and piratically took possession of said grade and laid down a railroad track thereon, which they are now operating. The action was commenced more than eight years ago. At that time the defendant had not completed the road and the plaintiffs demanded an injunction restraining the defendants from prosecuting the work. The injunction was not granted and was denied on the final hearing. A judgment was rendered for the plaintiffs for \$79,698.39.

The defendants appeal. The plaintiffs claim that the judgment should have been for some \$300,000 and they also appeal.

*John Porter and C. E. Albrook*, for plaintiffs.  
*S. K. Tracy*, for defendants.

ROTHROCK, J.—The case has once been in this court upon a question presented by a demurrer to the answer of the defendants. See 67 Iowa, 324. The opinion in that case contains quite a full statement of the facts of the case as shown by the original pleadings. The statement need not be repeated here. It is enough to say that the right of way and grade in question was at one time owned by the Iowa & Minnesota Railway Company, and that on the 4th day of June, 1881, it sold all its rights therein to the Forest City Southern Railway Company. The consideration agreed to be paid for the right of way and grade was \$5,000. The Forest City Southern Railway Company changed its name to that of the Chicago, Iowa & Dakota Railway Company, one of the plaintiffs herein. The \$5,000 purchase money has never been paid. After default was made in the payment of the purchase money, the Iowa & Minnesota Railway Company made and delivered to one of the defendants a deed of conveyance of said property and when this suit was commenced the defendants asserted the right to the entire right of way and grade. As will be seen by the opinion in the former appeal the claim was that the plaintiffs had forfeited whatever right they had to the property by failing to pay the purchase price at the time it was agreed it should be paid. It was intimated in the opinion that there was no forfeiture and it was held time was not of the essence of the contract. Case stated.

The court below on the trial of the case following that holding determined that the plaintiffs were entitled to recover damages of the defendants for the full value of the right of way and grade after deducting the \$5,000 purchase money and interest thereon. This finding was upon the theory that the evidence shows that the defendants practically appropriated or destroyed the said right of way and grade for the whole distance between Belmond and Forest City. It appears to us that the correctness of this finding under the evidence is the only real question in the case.

So far as appears from the evidence, the Chicago, Iowa & Dakota Railway Company was endeavoring to construct a railway from a place called Eldora Junction by way of Eldora to Alden and from the latter place to Forest City by way of Belmond. It completed its line to Alden and claims that it failed to continue on towards Forest City by reason of the tortious, malicious and unlawful occupation of its line by the defendants. The defendants had completed their

railroad from its main line at Vinton to and beyond Dows in Wright county, and commenced the construction of a branch line from Dows up the valley of the Iowa river to Belmond. The plaintiff had made default in the payment of the purchase money for the right of way and grade from Belmond to Forest City. The defendant took an assignment of all the rights of the Iowa & Minnesota Railway Company with a view to utilizing the grade and right of way in the construction of its line of road. The plaintiff claims that this was a great wrong; that it was "piracy," and this action was commenced. It is shown quite clearly by the evidence that after the action was commenced, the defendants abandoned the claim to the right of way and built their line across the old grade at some five places, and two of the crossings were made at such an acute angle as to be impractical as a railroad crossing. The civil engineer under whose immediate supervision the line was constructed was called as a witness by the plaintiff and he testified as to these crossings as follows: "The northern point to which defendant did construct its road is Madison Junction, six and one-half miles from Forest City, on the Minneapolis & St. Louis Railway; the distance from Madison Junction to Dows is about forty-two miles, and it was completed in September or first of October; the road from Belmond to Garner runs practically north and south about eighteen miles; the defendant company in building its line, built on a separate and distinct grade from the old Chicago, Iowa & Dakota road; in building that line from Garner to Belmond defendant has crossed the old grade four times; the first crossing is practicable and is about three miles from Belmond, and it is about three-fourths of a mile from the second crossing to the third; it is about nine miles from the third to the fourth crossing; from the fourth to the fifth crossing it is about nine miles; there is a little more curvature in the old grade than in the new one; the old grade is a little the shortest; the line adopted by defendant takes no part of the old grade except to cross it; at some places they are on their right of way parallel with them; they touch upon that right of way only for a distance of about three miles."

There is no evidence in conflict with the above as to the precise location of the defendant road. By computing the distance it will be seen that the five crossings are made in a distance of about twenty-three miles. The whole distance between the towns of Forest City and Belmond is about thirty-one miles. The evidence shows that the defendants' line, after making the last above-named crossing, does not follow near the old grade but bears off to the west to a con-

nection with the Minneapolis & St. Louis Railway, the track of which it uses from the Junction to Forest City.

Upon this state of facts the plaintiff contended that the crossing of the old grade was a practical adoption of that line, and that the plaintiff was thereby prevented from completing its whole line by extending its road from Alden to Forest City. And it is claimed with apparent confidence that there is competent evidence in the case by which the fact is established that the whole line of the plaintiff, including that which it has built had been damaged and injured more than \$300,000. This claim was not allowed by the court below and cannot be entertained here. The claim is based upon the rule that where a railroad company in the exercise of right of eminent domain under the authority of the state appropriates part of a tract of land for right of way, the railroad company must compensate the owner not only for the land actually taken, but for the depreciation in value of the whole tract. That rule has no application to such a state of facts as are presented in the record in this case, and in the numerous authorities cited by counsel to sustain the claim, there is no case similar in its facts to the case at bar.

It is unnecessary to further discuss the appeal taken by the plaintiffs. It is apparent upon the plainest principles of equity and good conscience that it should not be entertained.

The real question in the case is, did the court below adopt the correct rule in determining the question of damages? We think the damages allowed are based upon an erroneous view of the rights of the plaintiffs as disclosed by the evidence. Both of the railroad companies desired to construct and operate a railroad in that territory. The defendant company had the same right to build a line of road from Belmond north that the plaintiff company had. The evidence shows beyond all question that if the defendants' line had not touched the old roadbed, but had been built near it the old road would have been of no value whatever because no capitalists would have furnished the money to construct the second line. We think that when the competent evidence in the case is considered, and the incompetent evidence rejected, the plaintiffs would be entitled to damages for any advantage gained by the defendants in crossing the old line and appropriating part of its right of way. It crossed the line five times and at three of its crossings the angle was not so acute as to prevent a line from being constructed on the old roadbed and operated with safety. And the evidence shows that the matter of crossings would not prevent or interfere with

Appropriation  
of defendants'  
right of way—  
Damages.

Plaintiff en-  
titled to dam-  
ages for ad-  
vantage gain-  
ed by defend-  
ant.



the building of a line the whole distance, and that it could be built without any special alteration of defendants' line.

There is no evidence that the mere crossing of the line prevented the plaintiffs from completing their road to Forest City. It is true it is claimed that this did defeat the plaintiffs' enterprise. But the evidence does not sustain the claim. It is based upon mere matter of opinion or conjecture, because it is conceded all through the case in the evidence and arguments

Plaintiff not  
prevented  
from comple-  
ting its road.

that there was not sufficient business in that region to induce the construction of more than one line of road. One of the principal witnesses for the plaintiff testified on that question, as follows: "In referring to the fact that defendant has made a new grade the bigger part of the way between Belmont and Garner occupying the old roadbed only as shown and mentioned, what difference, if any, is there in the value of that old roadbed, right of way etc., whether they run upon it, or a thousand feet of it, for railroad purposes practically? Answer. Well, there might be a difference in the mechanical working in crossing, but so far as doing business is concerned the difference would perhaps be nothing whether it ran along the same grade or in a few feet of it; the damage would be the same as far as competition or division of the business is concerned, but the necessity of crossing the road many times would increase the damage in that respect. Cross Examination: Question. Then I understand you, the building of the new road caused the abandonment of the project of building on from Alden to Forest City. Answer. Yes, sir, that is, the building by defendants caused the abandoning by plaintiffs of building. Question. In other words, it was just the same so far as financial damage is concerned whether the new company occupied the entire old grade or built on a distinct and separate line, the damage would have been the same financially? Answer. Financially I so regard it; the business of the territory would not justify two lines, and if one were built, it would render the other useless as a railroad, and that is what causes the damage I have referred to." We have said that the only legitimate damages arise from the crossings made by the construction of the defendants' road, and the appropriation of the old roadbed and right of way. It appears from the evidence that we have quoted above that in making the crossings the defendants' road touched the right of way for the distance of about three miles. How much in width of the right of way was taken does not appear and what the actual damages to a company constructing a road on the old roadbed is not shown by any definite evidence. The plaintiffs base their claim on the facts that the

acts of the defendant in crossing the old line prevented the plaintiffs from using it. This claim is not supported by the evidence. The fact appears that the plaintiff purchased the right of way and grade and agreed to pay five thousand dollars therefor on the first day of June, 1883. It did not comply with its contract by making payment, but made default, and failed to make payment after a demand was made therefor in November, 1883, whereupon the Iowa and Minnesota Railway Company in consideration of five thousand dollars and interest thereon conveyed its interest therein to one of the defendants. And the plaintiffs have never at any time paid the five thousand dollars. It is true they tendered that amount to the defendants and it was refused. But this was long after the amount was due and a failure to pay upon demand. We cannot think that the plaintiff company was in a situation to proceed with the construction of its line, and was only prevented because the defendants crossed its line five times, when it was in such financial straits that it failed to pay five thousand dollars for thirty-one miles of graded road, which is now claimed is worth thirty-five hundred dollars a mile.

We are somewhat in doubt as to what disposition to make of the case. As we have said the evidence as to the damage, done to the old grade, by the crossings of defendants' road, is indefinite. That it was some damage Amount of damages. there can be no doubt, but before plaintiff can recover it must account for the five thousand dollars purchase money of the old grade, or rather that amount must be deducted from the damages. There is some evidence as to the value of the grade estimated by the mile. We have concluded in view of all the facts, including the fact that the crossings appropriated some of the old roadbed, that five thousand dollars would be fully equal to any damages sustained and that the plaintiff has not shown itself entitled to any sum in excess of that amount.

The decree of the district court is reversed and the plaintiffs' petition is dismissed. Reversed.

KINNE, J.—Took no part in the decision of this case.

**Rights of Rival Railroad Companies over Located Line or Right of Way.**—See *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co. (Pa.)*, 47 *Am. & Eng. R. Cas.* 224, and cases cited in note 228.

**SKOTTOWE v. OREGON SHORT LINE & UTAH NORTHERN R. Co.****MULLEN v. OREGON SHORT LINE & NORTHERN R. Co.***(Oregon Supreme Court, June 18, 1892.)*

**Defective Premises—Personal Injuries—Evidence as to Subsequent Repairs.**—In an action for personal injuries evidence that subsequent to the injury the premises alleged to have been defective were repaired, is competent for the purpose of showing ownership or control over the premises.

**Approach to Boat-Landing Maintained in Street—Defect—Liability of Railroad Company.**—The fact that an approach to a boat landing erected by a railroad company is maintained in a public street does not relieve such company from liability for personal injuries caused by the defective condition of such approach.

**Contributory Negligence—Passenger Going Aboard Boat in the Evening.**—It is not contributory negligence for a passenger to endeavor to board a boat in the evening instead of waiting until the morning, where it is shown that it was the custom of the railroad company running such boat to receive passengers in the evening and allow them to sleep aboard upon the payment of an extra charge. If the approach to such boat is insufficiently lighted and is not in a safe condition, the railroad company is liable for any injuries received on account thereof.

**Personal Injuries—Excessive Damages.**—A verdict for \$10,000 on account of personal injuries rendering the plaintiff unable to walk and permanently crippling him and subjecting him to great pain and suffering during his life, is not excessive.

**APPEAL from Wasco Circuit Court.**

Action to recover for personal injuries. Plaintiff had judgment for \$10,000. Also action to recover for the death of plaintiff's decedent. Plaintiff had judgment for \$1,500. The two cases were heard together on defendant's appeals, and both affirmed.

*W. W. Cotton, Zera Snow, and Wallace McCamant, for appellant.*

*Alfred S. Bennett, for respondents.*

**LORD, J.**—These actions are brought by Jane Skottowe in the one case, and by J. T. Mullen, as administrator of the estate of Nicholas Skottowe, in the other case, against the defendant, to recover damages resulting from a fall by Jane Skottowe and her deceased husband from an elevated way leading from The Dalles City to the defendant's boat landing; which fall caused serious injury to Jane Skottowe, and the death of her husband. The liability of the defendant is predicated on the ground that the

defendant was negligent in failing to keep in repair the elevated way or bridge, from which the plaintiff and the deceased fell, and were injured, and in failing to provide such place with proper lights. The answer of defendant put in issue all the material allegations of the complaint, and further alleging that the elevated way or bridge causing the injury and death was not the property, or in the possession, or under the control, of the defendant, and, as a separate defense, that the plaintiff and her deceased husband were guilty of contributory negligence. The facts are substantially these: The plaintiff and her deceased husband were citizens of Ireland, travelling in this country with the double purpose of visiting a son who resided in the state of Wyoming, and such places as would interest them or contribute to their pleasure. It would seem that they had secured a round trip ticket from Portland to The Dalles, and return, and that they had come up to The Dalles, by railroad, with the intention of returning to Portland by the river, on one of the boats of the defendant, for the purpose of obtaining a more complete view of the Columbia river scenery. The boats of the defendant were fitted up with staterooms and other adjuncts for the comfort and accommodation of its passengers. As the hour at which the defendant's boats were accustomed to leave in the morning was early, —7 o'clock,—the company, for its own advantage, and for the convenience of its passengers, allowed them to come on board of its boats at night, and to sleep there. For this accommodation the defendant charged and received a specified consideration, and by reason of it its passengers were saved from the necessity of arising at an inconvenient hour in the morning in order to reach the boat. The plaintiff and her husband reached The Dalles some time about the middle of the day, and during the afternoon went down to the wharf boat, as it would seem, for the purpose of acquainting themselves with the way to the boat's landing, and ascertaining what arrangements were necessary to be made to get on board of the boat. The agent of the defendant informed them at the office that they could come on board of the boat that night, as soon as it came in, and sleep there until morning, so that they would be on the boat at its hour of starting. Concluding to avail themselves of this accommodation, they returned up town, and after getting a meal at a restaurant, and walking and looking around until the time had come for the boat to arrive, they started down to its landing. It was after dark when the defendant's boat came in, but, owing to the fact that it had a barge in tow, it proceeded up the river, under slow bells, past its

landing place, to a point on the river about opposite the place where the accident occurred, for the purpose of landing the barge, when it turned back to make its landing. Her lights were lit, and it was while some of these things were occurring that the accident happened. The landing place of the defendant's boat is some distance below the inhabited portion of The Dalles, and is reached by a long elevated incline and narrow roadway which passes over Mill creek by means of a bridge. One portion of this roadway, at the point where it leaves the inhabited portion of The Dalles, is occupied by the defendant's railroad tracks, and leads to its shops, while the other portion of it gradually inclines, and leads to its wharf or boat landing. These two ways, at the point where the injury occurred, are connected, and rest on the same timbers. The situation is difficult to describe, but it is shown on the photographic exhibits. These different ways were originally built by the Oregon Steam Navigation Company, the defendant's predecessor in interest, for the purposes specified, and since then have been constantly used as a means of access to and from its shops and the landing place of its boats. At different times the company has rebuilt and repaired this roadway, raised and changed it, and exercised various acts of control over it. The place where the accident occurred, and over which the elevated roadway or bridge crosses Mill creek, is a short distance below the last building in the inhabited portion of the city. The land under the bridge was doubtless a public street at the point of the accident, as it seems to have been platted as such, but the city has never opened it as a street, nor exercised any control or ownership over the elevated roadway or bridge.

"There was no evidence," the record says, "in the case tending to show that Dalles City, or any one except the railroad company, and its predecessors in interest had exercised any control of the bridge at the place where the accident occurred, or had ever operated or repaired the same." The bridge is from twelve to twenty feet from the ground, which is of a rocky and uneven character, and along the bridge there has always been a "rail running," which a short while before the accident, got loose and came off, and never was replaced until after the injury occurred.

The circumstances of the fall from the bridge are thus related by the plaintiff: "We had passed the town and got to the way leading to the boat, it being then nearly dark. We suddenly fell down a height. The fall rendered me unconscious. I was aroused by my husband's calls for help. I became unconscious again, and then got conscious again when the men came to carry me up from where I had fallen.

Shortly before the accident we remarked to each other on the want of light. We were feeling our way cautiously along, immediately before the accident. My husband's calls for help at the place of the accident was the first thing I knew after the accident, while we were lying on the stones near the river." The injury to the husband of the plaintiff was of such a character as to cause his death a day or two afterwards. The injury to the plaintiff confined her to bed for many months, and, the evidence indicates, will render her subject perhaps to much suffering, and a cripple for the remainder of her life. From these facts and circumstances it seemsevident that the plaintiff and her deceased husband, while passing over the bridge or elevated roadway, seeing the boat out in the river, which was lighted up, and supposing that they had reached the landing, walked through the opening occasioned by the want of railing, and were precipitated upon the rocks below.

Upon this state of the facts the most vital point of the contention for the defendant is that the duty of a passenger carrier to provide reasonably safe approaches to a landing place or station is confined only to the immediate vicinity of its landing or station, and to approaches on its own ground or right of way, and that, as the facts show that the land over which the bridge was constructed, and where the accident occurred, was a public street, the defendant was under no obligation to keep such bridge in repair or properly lighted.

Defective approach—Public street.

There are other questions connected with this upon which error is alleged, and to which we shall advert at the proper time. There is, however, a preliminary question upon the evidence, to which an exception was taken; that must be first disposed of. One Mr.

Evidence as to repairs.

Allen was called as a witness for the plaintiff, and testified that he was in the employ of the defendant, and engaged in carpenter work; that about two days after the accident, he repaired the bridge, by replacing the missing railing. He was then asked the question, "Under whose direction?" To this question the defendant objected as incompetent and immaterial, whereupon plaintiff's counsel stated in open court, and in the presence of the jury, that he did not offer the testimony for the purpose of showing negligence, but for the purpose of showing acts of ownership and control over the bridge, and the court ruled that the evidence should be received for that purpose, and for that purpose only. The witness then answered that he was instructed by Mr. De Huff, the company's foreman or superintendent at the shops. It is conceded that this evidence is hardly sufficient to show

that Mr. De Huff had authority from the railroad company to make the repair in question but no proper means were taken to get rid of this aspect of it.

As already disclosed, this evidence was offered for the purpose of showing that the bridge or place where the injury was received was under the control of the defendant. As applicable to this object, no objection is made, if the evidence shall be restricted exclusively to this purpose. It is not the fact that repairs were actually made by the defendant, or the inference of control or ownership sought to be drawn, to which objection is urged, but that such evidence is inadmissible for that purpose unless the jury were instructed or expressly cautioned by the court when it was received, that it could not be considered by them on the question of negligence. Hence, it was argued, notwithstanding counsel for the plaintiff stated that the evidence upon objection was only offered to prove the control of the defendant of the place of injury, and not to prove negligence, and the court ruled, in the presence of the jury, that it would only be admitted for the purpose of showing control, that this statement and ruling were not enough to remove the objection for incompetency, unless the court went further when the evidence was received and instructed or cautioned the jury that they could not take it into consideration upon the question of negligence on the part of the defendant; otherwise the jury would be authorized to consider such evidence as proof of negligence, or to treat it as a link in the chain of such proof, contrary to the well-established rule that subsequent repairs are not competent for the purpose of proving antecedent negligence. That this rule is now to be regarded as settled law in a proper case is not controverted, as the authorities in support of it fully indicate. *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465, 11 Am. & Eng. R. Cas. 168; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 42 Am. & Eng. R. Cas. 229; *Nalley v. Hartford*, 51 Conn. 524; *Hudson v. Chicago & N. R. Co.*, 59 Iowa, 581, 8 Am. & Eng. R. Cas. 464.

But the principle seems equally as well established that, while evidence of additional precautions or subsequent repair is not competent for the purpose of proving antecedent negligence, it is competent for the purpose of showing that the place where the injury was received was under the control of the defendant, who may require the court, if he chooses, to restrict it to that point by a proper instruction. As the court said, in *City of Lafayette v. Weaver*, 92 Ind. 479, such evidence "was not admissible to prove negligence on the part of the city, the question as to which was to be determined by

what was known before and at the time of the accident; but it was evidence of the city's recognition of the defect in the sidewalk as one which the city was bound to repair, and was admissible for such purpose. \* \* \* By proper request the appellant could, through an instruction, cause the restriction of the evidence to its legitimate effect." See Elliott, Roads & S. 650, and authorities cited in notes. Independent of these considerations we do not think there was any liability of the jury considering the evidence for any other purpose than showing control or authority over the *locus in quo*, as the circumstances under which it was admitted expressly restricted it to this purpose, and exclude the idea of its being admitted to prove negligence. So that, as the exception stands, while we agree that such evidence is and ought to be regarded under any circumstances as incompetent as an admission of negligence, we do not understand it is incompetent to show authority over the *locus in quo*, or control over the place where the injury occurred. If the evidence was competent for this purpose there was no other defect, except possibly to show the authority of De Huff to order the repairs,—his agency to connect the company with the making of the repairs,—but this was regarded as of no consequence and merited little attention of counsel, for the reason, doubtless, that there was other evidence, before the accident, indicative of the defendant's control over the place of the injury, or recognition of its duty to keep the bridge in good condition and repair, such as the construction and repair of the bridge, and the exclusive use of it as a means of access to its boat landing. Moreover, as the question was asked, the answer might have been that the repair of the bridge was directed to be done by the representative of the defendant, so far as the court could know; but if the answer did not sufficiently connect the company—turned out to be improper—it was the duty of the defendant claiming to be injured by it to move to strike it out. Still, if we thought the evidence was incompetent, as the case stands, in view of its importance and liability to arise frequently in the trial court, we should hesitate to excuse the error, solely because no motion was made to strike it out.

The next alleged error is the refusal of the trial court to direct a verdict for the defendant. The contention is that the undisputed evidence shows no liability upon the part of the defendant. This is based upon the assumption that the undisputed evidence shows that the elevated walk or bridge to the boat landing of the defendant is upon a public street, and, as a consequence, neither the defendant nor its

Negligence of defendant in maintaining approach.



predecessors had any right to occupy the street by a bridge for this purpose, and that, even if they did so originally by constructing, and subsequently by keeping it in repair, it was a voluntary act, and placed the defendant under no obligation to keep it in repair, or liability for want of repair. As the question involved is important and vital as affecting the liability of the defendant, it deserves to receive, despite the pressure of our duties, our best consideration. At the risk, therefore, of some repetition of the facts already stated, but to make more clear, if possible, the relation of the defendant to the *locus in quo*, as a part of its means of approach to its boat landing, and the relation of the city to it, as showing its control over it, we quote from the bill of exceptions the following facts: "Plaintiff also called as witnesses John Cates, R. A. Roscoe, and George H. Knaggs, whose evidence tended to show that the bridge in question, from which it is claimed that the fall occurred, was constructed by the Oregon Steam Navigation Company, a transportation company engaged in operating boats and portage roads from The Dalles, on the Columbia river; that the Oregon Railway & Navigation Company succeeded to the Oregon Steam Navigation Company; and further tended to show that the Oregon Railway & Navigation Company continued to operate and control the bridge until their railroad and boat line was leased to the defendant, as shown herein; and that the bridge in question was the bridge extending on from Main street, in Dalles City, across a ravine through which Mill creek runs, and leading to the lower boat landing used by the Oregon Railway & Navigation Company as a landing for the boats operated by them on the Columbia river; that it was such bridge, leading to such landing, at the time of the lease, and since then it had been used by the present company in operating boats on said river, as a means of access to and from the town of The Dalles and the boat landing. The evidence further tended to show that the bridge had been raised once or twice by the Oregon Railway & Navigation Company and the defendant company and that the defendant company had exercised acts of control over the bridge in keeping the same up, and preventing it from being floated away by high water, and by its means the route over this bridge was the only route to the lower boat landing; and no other person or persons had anything to do with the control of said bridge, or keeping it in repair, from the time it was built up to the time of the injury to the plaintiff. The evidence of these witnesses also tends to show that there was no business other than that connected with the defendant company's business,

west of the bridge in question, which would take persons thereover, and that the bridge was used only by persons having business with the defendant company, and that it was used by such persons in traveling to and from its wharf, for the purpose of traveling over its line, and in shipping and receiving freight. The testimony of these witnesses further tended to show that one side of the bridge in question was a railroad bridge used exclusively by the defendant as a means of access to its shops and roundhouses, the other portion of the same being a narrow plank roadway used as a means of access to and from its boat line and wharves, with the two ways separated and deflected from each other some distance west of the place where plaintiff was injured."

In view of these facts, it is important to ascertain the duties of the defendant, as a public carrier, to keep all the approaches to their boat landing or depot, owned by them or constructed by them, and under their control or in their possession, and used in connection therewith, safe and convenient for the use of its patrons, or those who have lawful occasion to use them. DILLON, C. J., laid down the rule, as founded upon reason and authority, that "railroads are bound to keep in safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, all portions of their station ground reasonably near to the platforms, where passengers or those who have purchased tickets with a view to passage on their cars would naturally or ordinarily go." *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa, 145. Such corporations are not only bound to keep their platforms and landing places safe and convenient for all who make use of their cars or boats as a means of conveyance, but they are bound to make the approaches over their own premises, or premises in their possession and used in connection therewith, safe and convenient for passengers. The liability for the non-performance of this duty by such corporations is founded on the general principle that a person injured without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass, for a lawful purpose, by an invitation express or implied, can recover damages for the injury sustained against the individual so inviting, and being in default for the defect. *Barrett v. Black*, 56 Me. 498; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 219.

This principle finds its illustration in *Tobin v. Portland S. & P. R. Co.*, 59 Me. 183. There a hackman, while carrying a passenger to the depot for transportation, stepped, without fault, into a cavity in the platform, and was injured; and it was held that the company was liable, and that the liabil-

ity was the same, notwithstanding the platform was within the limits of the highway. The court, after stating that it was the duty of such corporations to make the approaches to their depots safe and convenient, and likewise to so keep their platforms and landing places, not only for those who are passengers, but for all who have rightful occasion to use them, say: "It is objected that the defendant built the platform within the limits of the public highway. But it is no answer to the plaintiff, when seeking compensation for the consequences of their neglect, that they have trespassed upon the rights of the public. They have built the platform, and used it. Their passengers and those having rightful occasion to be upon it are there by their invitation, and they are responsible for its condition. It may be that the city of Portland might be liable for a nuisance within the limits of its public highways, erected and maintained by the defendant corporation. But, if so, the city has the right of reclamation against those creating the nuisance. Much more, then, could the party injured maintain his action directly against the corporation causing the injury."

In *Quimby v. Boston & M. R. Co.*, 69 Me. 340, these principles are reasserted but the fact that the sidewalk where the injury occurred was not in the possession and control of the defendant as one of the approaches to their station defeated a recovery. The court say: "A railroad corporation is bound to keep its depot and the grounds around it, owned by the corporation, or in its possession, and used in connection with it, safe and convenient for persons who have lawful occasion to use them. It is bound to keep all approaches to its depot, constructed by it and under its control, for the use of persons having lawful occasion to use them, to go to or from its depot or cars, safe and convenient for such use, even though the same may be within the limits of the highway. The burden was on the plaintiff to show that the walk where he received his injury was constructed by the defendants, and was in their possession and control as one of the approaches to their station." The court then proceeds to state the facts, showing that the sidewalk was not in the possession of the defendant, but that the city had resumed control of it, and kept it in repair, and, as a consequence, that the defendant corporation was not liable. The court say: "Upon this state of facts, we think it clear that the defendants were under no obligation to keep the sidewalk in repair. It was no part of their bridge. It was a part of the public street, under control of the city. The defendants had no right to enter upon it to make any changes or repairs. Their liability ceased when they restored the condition of the sidewalks to

the acceptance of the city." This case is cited by the defendant, but the principle it declares and recognizes is fatal to its contention.

Mr. Hutchinson says: "It is the duty of the carrier to provide a reasonably safe means of getting to and from the station, and it will be liable for an injury resulting from its failure to do so; and if passengers habitually, naturally, and with the acquiescence of the carrier, adopt a certain route, especially a route pointed out by the customs and methods of the carrier, it is the duty of the latter to take reasonable precautions to so guard and maintain it that passengers will not thereby suffer injury. It is immaterial in this respect whether the carrier furnished the route, or provided or constructed the means of passage, or not. If, with full knowledge of the facts, it permits an unsafe and dangerous means to be provided and used, it is as much liable for an injury arising therefrom as though it had itself set up and maintained the dangerous way. The same rules apply to carriers by water, who are liable for furnishing dangerous gang planks for use by passengers." *Hutch. Carr.* (2d Ed.) § 519; *Cross v. Lake Shore & M. S. R. Co.*, 69 Mich. 363, 35 Am. & Eng. R. Cas. 476; *Hoffman v. New York Cent. & H. R. Co.*, 75 N. Y. 605; *Green v. Pennsylvania R. Co.*, 36 Fed. Rep. 68; *Texas & St. L. R. Co. v. Orr*, 46 Ark. 195; *Wallace v. Wilmington & N. R. Co.*, (Del.) 18 Atl. Rep. 818; *Collins v. Toledo, A. A. & N. M. R. Co.*, 80 Mich. 390.

Plainly, then, it is the duty of such corporations to provide reasonable accommodations at their stations and landing places, to keep in safe condition all portions of their platform and approaches thereto, and furnish safe and proper means of ingress and egress therefrom, even though some part of it may be constructed upon a highway, if the same be in their possession, or under their control, and used in connection with them. This duty and the liability of such corporations for its nonperformance, when an injury occurs, in respect to such places, platforms, approaches, as well as to furnish lights, is also fully stated, and the cases maintaining it collected, in *Alabama G. S. R. Co. v. Arnold*, 80 Ala. 600, 30 Am. & Eng. R. Cas. 555, note; but by this it is not meant that such companies are bound to keep their premises absolutely safe, or that they are liable for accidents due to want of ordinary care on the part of the injured person. They are only bound to exercise ordinary care in view of the dangers to be apprehended. The distinction between such liability for an injury to a passenger occurring on their cars or boats, and for an injury occurring on their platforms or approaches to the station or landing places, is well recognized. *Pennsyl.*

vania Co. *v.* Marion, 104 Ind. 239, 27 Am. & Eng. R. Cas. 132; Moreland *v.* Boston & P. R. Co., 141 Mass. 31; Kelly *v.* Manhattan R. Co., 112 N. Y. 443, 37 Am. & Eng. R. Cas. 60. Nor is there any claim that the defendant is an insurer, but that it was bound to use ordinary care to keep its approaches to its boat landing safe and convenient, and that to leave a railing off of a bridge of this kind, at such a place, and at such a height from the ground, for a period of several weeks, was a want of ordinary care, if not gross negligence. Nor do the cases cited by the defendant conflict with these principles, as declared by the authorities, or support its contention. It will be sufficient to notice those claimed to be most in point. In Eisenberg *v.* Missouri Pac. R. Co., 33 Mo. App. 91, it did not appear that the road had been built by the defendant, and held out to its patrons as a way to its depot. There was another and safer road, and the exact situation of the defect was known to the plaintiff. The only element in the case is that, prior to the accident, the company had improved it, but, upon the plaintiff's own testimony, the case was void of all elements of negligence upon the part of the defendant. The court says: "In the case at bar, the danger was neither a hidden nor recent danger. The excavation existed before the road was built. The plaintiff knew the exact situation for years. His drivers knew it. This very driver had traveled over the road repeatedly on the day of the accident. He discussed such dangers when they were in full view, in broad daylight, with his fellow-servant, and, knowing what risk he undertook, voluntarily assumed it, although he might have used another and safer road." It was a clear case of contributory negligence. In Cusick *v.* Adams, 115 N. Y. 58, the bridge was built for the convenience of the defendant. The plaintiff was a stranger to him, and to whom he owed no duty. Nor was the plaintiff upon the bridge upon the defendant's invitation, nor to do any business with him, but for the purpose of seeing a shooting match upon an island with which the defendant had no connection whatever. In Texas & N. O. R. Co. *v.* Dessommes, (Tex. Sup.) 15 S. W. Rep. 806, the testimony was so positive and definite that the defendant had nothing whatever to do with the crossing at the place of the injury that the verdict was held contrary to the evidence. There is no relevancy in the cases, or the others cited, to the case at bar; nor is there anything in the fact, if it be admitted, that the land where this bridge was constructed and maintained by the defendant was platted as one of the public streets. It by no means follows that the city was bound to open the same to public travel. As THAYER, C. J., after showing that the ded-

ication of streets by maps and plats was irrevocable, and vested them in the public, said: "But it does not follow that the city is under any obligation to open and improve such streets at once; they may be allowed to remain dormant until their use becomes a public necessity." *Meier v. Portland Cable R. Co.*, 16 Or. 500. There is no pretense or evidence to show that the city had opened this street beyond its inhabited portion. The evidence is undisputed that the defendant built the bridge partly upon it for its own purposes, and has ever since used it, exclusively, as a railroad bridge, and as a way to its boats. The city had nothing to do with it. "There was no business other than that connected with the defendant company's business, west of the bridge in question, which would take persons thereover, and it was used only by persons having business with the defendant company, in traveling to and from its wharf for the purpose of traveling over its line, and in shipping and receiving freight." So runs the record.

Nor do we think there is anything in the contention that the defendant is not liable because the plaintiff and her husband started to go on the boat in the evening, instead of in the morning. It was the custom of the defendant to receive passengers on its boats in the evening, and allow them to sleep there, for which they were charged extra, or "fifty cents for single berths, and six bits for double." Its officers at the wharf boat informed the defendant and her husband of the custom, and they were going to the boat to avail themselves of it when the injury occurred. By so doing the defendant invited its patrons to take passage on its boats in the evening instead of in the morning, and was bound to make its approaches safe for the travel of such persons as it was for persons who came on board of the boat in the morning. We think there was no error.

Contributory  
negligence.

It is next objected that the court erred in declining to instruct the jury that the platting of the ground under the bridge in question as a public street, and selling lots by reference to the same, constituted a dedication of the street. This objection is embraced in five long instructions out of the numerous instructions asked, and are justly subject to the criticism suggested by counsel. The proposition itself was not disputed as a matter of law, nor was the refusal of the court to give the instructions asked in conflict with it. It was the fact that the instructions ignored the distinction between the dedication of a street and the opening of that street as a public highway, by which the defendant sought to excuse liability, that caused the court to refuse them; but

the view we have taken renders their further consideration unnecessary. The evidence shows that the street was not opened by the city, nor used by it, but that it was exclusively occupied by the defendant with its bridge as a means of access to its boat landing, and under its control at the time of the accident.

It is next objected that the trial court erred in refusing and modifying instruction No. 16, upon the question of contributory negligence. This instruction is objectionable, but instruction No. 39, as given by the court, better states the law, as applicable to the facts. There can be no doubt but the bridge was a place where a railing or guard on it was necessary at all times, but especially after dark, when passengers were expected to travel over it to and from the landing place. The plaintiff and her husband were strangers, and the circumstances already stated were not such as the court could declare contributory negligence.

The next objection is that "the court erred in instructing the jury that the defendant was bound to keep its approaches

**Duty to keep approach safe at night.** safe and well lighted at all hours of night, regardless of the time set for the departure of its boats." This refers to the court declining to give certain

instructions asked by the defendant, and giving certain others asked by the plaintiff. By the instructions thus given and refused, it is claimed that the court imposed upon the defendant the duty to keep the approaches or bridge constructed by it, and under its control, leading to its steamboat landing, in such order and repair, and so well lighted, as to be reasonably safe at all hours of night. The complaint is that this laid the duty on the defendant regardless of time, and of the fact that the boat did not leave until the next morning. Upon this point the instruction given by the court was: "If the defendant had been in the habit of and accustomed to take passengers on the boat in the evening, and permitting them to sleep thereon, then its liabilities as to a passenger passing over its walks and ways in the evening for such purpose would be just the same, and its duties as to keeping its ways to its boat would be just the same, as it would towards a passenger going to the boat at the hour of starting in the morning." The court did not, therefore, instruct the jury that the defendant was bound to keep its approaches safe and well lighted at all hours of the night. The plaintiff and her husband were going down to the boat, as the evidence indicates, between 6 and 8 o'clock in the evening. It was the usual time when the defendant was in the habit of receiving passengers. They were invited to come on board, and they had a right to be there; they

were going there to do business with the defendant,—to sleep on board of the boat all night, and pay for the accommodation. The benefit was mutual. It was not a gratuitous privilege for their own special convenience. The boat was just coming into its landing, and the time was in the evening, and appropriate. There is no claim, nor can be on the facts, that it was the duty of the defendant to keep its approaches to its landing safe at all hours of the night, but that it was its duty in the evening, when it was accustomed to receive passengers. Whether it was the duty of the defendant to keep them in that condition at other later hours of the night was a matter with which the plaintiff in this case has no concern.

It is next objected that the damages awarded are excessive. The damages assessed by the jury are large. The evidence tends to indicate that the plaintiff is permanently injured. "I think," says the medical witness, "that if she does regain the use of her limb, and it becomes free from pain, it will be several years. It will take a long time to fully recover, if she ever does." She is unable, now, to stand without support, and altogether unable to walk, and still suffers great physical pain from the injury. The probabilities are that she will be a cripple during her life, and subject to much pain and suffering. In such case different individuals would vary in their estimate of the sum which would be a just pecuniary compensation. "It is one thing," said Mr. Justice STORY, "for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury because it exceeds that measure." *Thurston v. Martin*, 5 Mason (U.S.) 497. Nor is the fact to be overlooked that the judge who heard the testimony, in refusing the motion for a new trial, approved the verdict of the jury. In such case, it has not been the practice of this court to interfere, nor, if such was not the practice, are the damages given so excessive as to justify our interference. Many larger verdicts for less injuries have been sustained by the courts.

Thus far, the cases have been considered together; but the point is made in the administrator case that no earning power was proven on the part of the deceased. This is based on the inference that the deceased was a wealthy man, living on his income. Under the statute, the age and sex, the general health and intelligence of the deceased, his habits and capacity, mental and physical, to earn and acquire property, are all to be considered. The deprivation of his affection and society cannot be taken into account. This would include skill in the management of wealth, or capacity to

Damages for  
personal in-  
juries.



manage affairs, which would be of advantage to an estate, and the loss of which would prove a detriment to it. In view of all the circumstances, we are unable to say there was error, and must affirm the judgments, or judgment, in both cases.

**Liability of Railroad Company for Injuries Caused by Defective Stations and Approaches.**—*Ensley R. Co. v. Chewning* (Ala.) 50 Am. & Eng. R. Cas. 46, note 55; *Woolwine v. Chesapeake & O. R. Co.* (W. Va.) 50 *Id.* 37, note 46; *Graham v. Pennsylvania R. Co.* (Pa.) 47 *Id.* 522, note 528, note 37 *Id.* 66.

**Evidence as to Repairs and Alterations after Accident.**—See *Terre Haute & I. R. Co. v. Clem*, (Ind.) 42 Am. & Eng. R. Cas. 229, and cases cited in note 233.

**Excessive Damages for Personal Injuries.**—See note, 46 Am. & Eng. R. Cas. 667-679.

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## UNITED STATES

*v.*

## TRANS-MISSOURI FREIGHT ASSOCIATION.

(*U. S. Circuit Court, D. Kansas, F. D. Nov. 28, 1892.*)

**Railroad Traffic Association—Contract in Restraint of Trade—Public Policy—Congressional Anti-Trust Law.**—An agreement between a number of railroad companies constituting a traffic association, the object and purpose of which is to maintain just and reasonable rates, and prevent unjust discrimination in compliance with the terms of the Interstate Commerce Act, by furnishing equal facilities for the interchange of traffic between the several lines, is not an agreement, combination, or conspiracy in restraint of trade, in violation of the first section of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies," commonly known as the "Anti-Trust Law."

**Same—Monopolization of Commerce.**—The public is not entitled to free and unrestricted competition between railroad companies, but is only entitled to a free and healthy competition, and therefore there is nothing in such an agreement tending to create a monopoly in violation of the second section of the said Act.

**Same—Transfer of Franchises and Corporate Powers.**—An agreement between a number of railroad companies creating a traffic association, whereby each company maintains its organization as before, elects its officers, operates its line, and gives no power to the association to govern in any respect the operations, or method of transacting the business of the lines, and leaving each line perfectly free to transact all the business it can secure, and in its own way, although containing a provision for regulating changes in rates, and that the association shall consist of a representative of each of the lines, not necessarily a officer of the company, does not amount to a transfer of the franchises and corporate powers of the different railroad companies, and is not forbidden by public policy.

**Congressional Anti-Trust Law—Application to Combinations between Railroads.**—The Act of Congress of July 2, 1890, "To Protect Trade against Unlawful Restraint and Monopolies" does not apply to combinations or agreements between railroad companies. ●

SUBMITTED upon bill and answer.

This is an action brought by the District Attorney for the District of Kansas, under the direction of the Attorney General, in the name of the United States of America, against the Trans-Missouri Freight Association and eighteen railroads constituting that association, to restrain, enjoin and prohibit alleged violations of the Act of Congress of July 2, 1890, "An act to protect trade and commerce against unlawful restraints and monopolies." (26 U. S. Statutes at Large, 209.)

The substance of the allegations of the bill is as follows :

*First.* That defendants are common carriers, incorporated under public statutes of the States and of the United States, and are engaged in freight business between and among the States and Territories of the United States; and that prior to March 5, 1889, each of the defendants owned, operated and controlled separate lines of railroad, and furnished to persons engaged in trade and commerce among the States and Territories of the United States separate, distinct and competing lines of transportation between the States and Territories of the United States lying west of the Missouri river, to the Pacific ocean; and that to encourage and secure the benefit of competing lines of transportation throughout that region of country, the Government of the United States and the States and Territories within that region had granted to the defendants public franchises, land grants, securities, and subsidies of great value.

*Second.* That on the 15th day of March, 1889, the defendants, not being content with the rates of freight they could receive with free competition among themselves, but contriving and intending, unjustly and oppressively, to establish and maintain arbitrary rates of freight and transportation in the interstate commerce throughout the region aforesaid, did combine, conspire, confederate, and unlawfully agree together, and enter into a written agreement and contract known as the "Memorandum of Agreement of the Trans-Missouri Freight Association."

By the terms of this agreement the association has control of all competitive traffic between points in that region of country lying west of a line commencing at the 95th meridian, on the Gulf of Mexico, and running north to Red river, and thence to the eastern boundary of the Indian Territory; thence along the eastern line of said Territory and of the State of Kansas to Kansas City, Mo.; thence by

the Missouri river to the Montana line; thence to the international line between this country and the British possessions. The association acts by a board, created by each company appointing one person to represent it in the association, and the several railroad companies, members of the association, resigned to it the power to establish and maintain rules, regulations and rates on all competitive traffic, through and local, in that region of country. The association is given power to punish, by fine, any member that reduces a rate fixed by the association.

*Third.* That on the 1st day of April, 1889, said agreement took effect, and that ever since said time, by reason of said agreement and combination and association, and under duress of the fines and penalties prescribed by the articles thereof, each and all of the defendants have put into force and maintain tariffs and rates of freight fixed by said association; and that the officers and agents of said railroad companies have ever since said time refused to put into force reasonable rates of freight, based upon the cost of construction and operation of their several lines of railroad, and other proper elements to be considered in the making of freight rates; and that the people engaged in trade and commerce in said region of country are, by means of said association, deprived of rates of freight and the benefits and facilities that might reasonably be expected to flow from free competition between said several lines of transportation: whereby the said freight traffic within said region is monopolized, restrained, injured and retarded by said defendants by means of and through the instrumentality of the said Trans-Missouri Freight Association.

*Fourth.* That on the 2d day of July, 1890, an act to protect trade and commerce against unlawful restraints and monopolies, enacted by Congress, was duly approved, and became a law governing the defendants in the freight traffic pertaining to interstate commerce throughout the United States, and that said association is in violation of said act, notwithstanding which said defendants still continue to act in and maintain the arbitrary rates of freight fixed by said Trans-Missouri Freight Association.

*Fifth.* Wherefore, the complainant prays the court that said defendants, and each and all of them, be enjoined and prohibited from further agreeing, combining, conspiring and acting together to maintain rules and regulations and rates for carrying freight upon their several lines of railroad to hinder trade and commerce between the States and Territories of the United States, and that they be enjoined and prohibited from continuing in a combination, association or

conspiracy to deprive the people engaged in trade and commerce among the States and Territories of the United States of such facilities, rates and charges of freight transportation as will be attained by free and unrestrained competition between said several lines of railroad; and that said defendants be enjoined and prohibited from agreeing, combining, conspiring and acting together to monopolize, or attempting to monopolize, freight traffic in the States and Territories of the United States; and that said defendants, and all of them, be enjoined and prohibited from agreeing, combining, conspiring and acting together to prevent each or any of their associates from carrying freight and commodities in the trade and commerce between the States and Territories of the United States at such rates as shall be voluntarily fixed by the officers and agents of each of said roads acting independently and separately in its own behalf.

The real gist of the bill may be stated as follows: That defendants are common carriers, owning, operating and maintaining independent lines of railroad under and by virtue of charters granted by public statutes, and engaged in the freight traffic between the States, and that they have formed, and still maintain, an association which is unlawful in this:

1. Because it suppresses competition between the separate and independent companies, which, without said agreement, would furnish to the public competitive lines of transportation throughout said region of country, and between the States and Territories thereof.

2. Because it places the power to establish and maintain rates, rules and regulations governing the freight traffic on all railroads controlled by the members of said association in the hands of a single board, and in the hands of an unauthorized and irresponsible agency, whereas, the officers and agents of each of said companies are required by law to fix and establish rates, rules and regulations governing the freight traffic on their railroad, and therefore monopolizes, and attempts to monopolize in the hands of the Trans-Missouri Freight Association, all of the freight traffic in the interstate commerce in said region of country described.

All portions of the memorandum of agreement which are deemed pertinent to this controversy are set out in the bill. The defendants have admitted the agreement in their answers. A copy of it, as set forth in the answers of the defendants, is as follows:

MEMORANDUM OF AGREEMENT, Made and entered into this fifteenth day of March, 1889, by and between the following railroad companies, viz.:

Atchison, Topeka & Santa Fe R. R.,  
 Chicago, Rock Island & Pacific Ry.,  
 Chicago, St. Paul, Minneapolis & Omaha Ry.,  
 Burlington & Missouri River R. R. in Nebraska,  
 Denver & Rio Grande R. R.,  
 Denver & Rio Grande Western Ry.,  
 Fremont, Elkhorn & Missouri Valley R. R.,  
 Kansas City, Ft. Scott & Memphis R. R.,  
 Kansas City, St. Joseph & Council Bluffs R. R.,  
 Missouri Pacific Ry.,  
 Sioux City & Pacific R. R.,  
 St. Joseph & Grand Island R. R.,  
 St. Louis & San Francisco Ry.,  
 Union Pacific Ry.,  
 Utah Central Ry.,

and such other companies as may hereafter become parties hereto.

*Witnesseth*: For the purpose of mutual protection, by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

#### ARTICLE I.

The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

1. All traffic competitive between any two or more members hereof, passing between points in the following described territory: Commencing at the Gulf of Mexico, on the 95th meridian, thence north to the Red river; thence via that river to the eastern boundary line of the Indian Territory; thence north by said boundary line and the eastern line of the State of Kansas to the Missouri river at Kansas City; thence via the said Missouri river to the point of intersection of that river with the eastern boundary of Montana; thence via the said eastern boundary line to the international line—the foregoing to be known as the “Missouri River line;” thence via said international line to the Pacific coast; thence via the Pacific coast to the international line between the United States and Mexico; thence via said international line to the Gulf of Mexico; and thence via said Gulf to the point of beginning, including business between points on the boundary line as described.

2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri river line.

## EXCEPTIONS:

(a) The D. & R. G. and the D. & R. G. W., except their business to and from points in Colorado west of the D. & R. G. line between Denver and Trinidad; also business via their lines between points in Colorado and points in Utah.

All local business between Denver and Trinidad and intermediate points; all local business of the A. T. & S. F. between Pueblo and Canon City, Colo.; all stone traffic having both origin and destination within the State of Colorado.

The jurisdiction of this association, in so far as the business of the Denver & Rio Grande Railroad and the Denver & Rio Grande Western Railway Companies is concerned, covers the following traffic, namely:

All freight traffic to, from or through all common or junction points in the States of Nebraska and Kansas and the Indian Territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad.

All freight traffic between Ogden, Spanish Fork and intermediate points on the one hand, and to, from or through points in Kansas or Nebraska upon or east of the 103d meridian, on the other hand.

Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver & Rio Grande Western Railway.

(b) Traffic included in the Trans-Continental and International Association.

(c) Traffic passing between points in Kansas or Nebraska and Mississippi river points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the Southern States east of the Mississippi river and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers.

(d) Traffic passing between Missouri river points and points in the territory east of said river.

(e) All traffic to points on the Northern Pacific and Manitoba Railways.

(f) Traffic to points in Arkansas.

(g) Coal, stone and gravel from Colorado, Wyoming, and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Missouri.

(h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, in-

cluding coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado.

(i) Business to and from Florence, Colorado, by all lines.

## ARTICLE II.

SECTION 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two-thirds vote of the members.

SEC. 2. There shall be regular meetings of the association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting—regular or special—is convened, it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. Each road shall designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings, when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute with written authority to act upon all questions, which may arise, and the vote of such substitute shall be binding upon the company he represents.

SEC. 3. A committee shall be appointed to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ, the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree, it shall be arbitrated in the manner provided in article VII.

SEC. 4. At least five day's written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah.

SEC. 5. At each monthly meeting the association shall consider and vote upon all changes proposed, of which due notice has been given, and all parties shall be bound by the decision of the association, so expressed, unless then and there the parties shall give the association definite written notice that, in 10 days thereafter, they shall make such modification, notwithstanding the vote of the association; *Provided*, That if the member giving notice of change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn.

Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of such majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote, upon such other traffic put into effect corresponding rates to take effect on the same day. By unanimous consent, any rate, rule or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

SEC. 6. Notwithstanding anything in this article contained, each member may at its peril, make at any time, without previous notice, such rate, rule or regulation as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman, upon investigation, shall decide that such rate is not necessary to meet the direct competition of lines not members of the association and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate, it shall be reported to the association, and if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition it shall be considered as authority for the rate so made.

SEC. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: *Provided, however*, That when one road has a proprietary interest in another, the divisions between such roads shall be what they may elect, and shall not be the property of the association: *Provided further*, That as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

SEC. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine, by a majority vote (the member against whom complaint is made to have no vote), what, if any, penalty shall be assessed, the amount of each fine not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction or change in rates,



or change in the rules and regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

SEC. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

SEC. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefitted by the amounts it may pay as fines.

SEC. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

### ARTICLE III.

The duties and powers of the chairman shall be as follows:

SECTION 1. He shall preside at all meetings of the association, and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by the association.

SEC. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules and regulations prevailing on all lines parties hereto on business covered by this agreement; and each of the parties hereto agrees to furnish such number of copies of the rates, rules and regulations issued by it as the chairman may require.

SEC. 3. He shall construe this agreement, and all resolutions adopted thereunder, his construction to be binding until changed by a majority vote of the association.

SEC. 4. He shall publish in joint form all rates, rules and regulations which are general in their character and apply throughout the territory of the association, and shall also publish, in the manner above, such rates, rules or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest.

SEC. 5. He shall be furnished with copies of all way-bills for freight carried under this agreement, when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Rail-

way Association agreement as to lines members thereof.

SEC. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on the members for the different amounts thus shown to be due.

SEC. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect and dispose of the fines for such violations, as provided for herein.

SEC. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member.

SEC. 9. Only the parties interested shall vote upon questions arising under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 3, article III, of the agreement.

#### ARTICLE IV.

Any willful underbilling in weights, or billing of freight at wrong classification, shall be considered a violation of this agreement; and the rules and regulations of any weighing association or inspection bureau, as established by it or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

#### ARTICLE V.

The expenses of the association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at its first regular meeting thereafter, determine the matter, which may be done by a two-thirds vote of the members.

#### ARTICLE VI.

There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employes, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

#### ARTICLE VII.

In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be

brought before the association, it shall be referred to an arbitration board which shall consist of three members of the executive board of the Interstate Commerce Railway Association: *Provided, however,* That in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

## ARTICLE VIII.

This agreement shall take effect April 1, 1889, subject thereafter to 30 days' notice of a desire on the part of any line to withdraw from or amend the same.

*J. W. Ady*, U. S. Dist. Attorney, and *S. R. Peters*, for complainant.

*George R. Peck, B. P. Waggener, Wolcott & Vails, Wallace Pratt, J. P. Dana, Spencer, Burnes & Mosman, J. D. Strong, W. F. Guthrie, J. M. Thurston, A. L. Williams, N. H. Loomis, R. W. Blair, John R. Hawley, W. F. Evans, M. A. Low, James Hagerman and T. M. Sedgwick*, for defendants.

**RINER, J.**—This is a bill in equity brought by the United States Attorney for the District of Kansas by direction of the Attorney General in the name of the United States against the Trans-Missouri Freight Association and eighteen railway companies which, it is alleged in the bill, constitute that Association.

The object and purpose of the bill is to obtain a decree declaring said Freight Association dissolved, and enjoined defendants, and each of them, from carrying out the terms of a certain Memorandum of Agreement entered into by and between the eighteen railway companies, forming this association, which agreement it is alleged is unlawful because maintained by said railway companies in violation of an act of Congress, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies" approved July 2nd, 1890.

It is alleged in the bill that the defendants (the eighteen railway companies) are common carriers incorporated under public statutes of several states and of the United States, and are engaged in moving, carrying and transporting freight and commodities in the commerce, trade and traffic which is continuously carried on among and between the several states of the United States and among and between the several states and territories of the United States and between the states and territories of the United States and foreign countries, and that prior to March 15th, 1889, each of the defendants, railway companies, owned, operated and controlled separate lines of railroad and fur-

Allegations in bill.

nished to persons engaged in trade and others, among the states and territories of the United States, separate, distinct and competing lines of transportation between the states and territories of the United States lying west of the Missouri river and east of the Pacific Ocean, and that to encourage and secure the benefit of the competing lines of transportation throughout that region of country, the government of the United States and the states and territories within the region just mentioned had granted to the defendants public franchises, land grants, securities and subsidies of great value.

That on the 15th day of March, 1889, the defendant railway companies, not being content with the rates of freight they could receive with free competition among themselves, but contriving and intending unjustly and oppressively to establish and maintain arbitrary rates of freight and transportation in the interstate commerce, throughout said region, did combine, conspire, confederate and unlawfully agree together and did enter into a written agreement and contract, known as the Memorandum of Agreement of the Trans-Missouri Freight Association, by the terms of which said agreement the association has control of all competitive traffic between points in that region of country lying west of a line commencing at the 95th meridian on the Gulf of Mexico and running north to the Red River and thence to the eastern boundary of the Indian Territory; thence along the eastern line of said territory and of the State of Kansas to Kansas City, Missouri; thence by the Missouri River to the point of intersection of that river with the eastern boundary of Montana; thence by said eastern boundary line to the international line between this country and the British Possessions.

That the said association acts by a board created by each company appointing one person to represent it in the association and that the several railway companies, members of the association, gave to the association the power to establish and maintain rules, regulations and rates on all competitive traffic, through and local, within the region of country described in the agreement, and that said association by the terms of the agreement is given the power to punish by fine any member that reduces the rate fixed by the association.

It is further alleged in the bill that the said agreement took effect on the first day of April, 1889, and that ever since that time the said railway companies by reason of said agreement and combination and under duress of the fines and penalties prescribed in the articles of agreement, have put in force and maintained, and now maintain, tariffs and rates of freight fixed by said association; and that the officers and

agents, of said railway companies, have ever since said agreement took effect, refused to put in force reasonable rates of freight based upon the cost of construction and operation of their several lines of railroad and other proper elements to be considered in the making of freight rates, and that the people engaged in trade and commerce within the region of country mentioned in said articles of agreement, are by reason of said combination and association deprived of rates of freight, benefits and facilities which might reasonably be expected to flow from free competition between said several lines of transportation.

It is further alleged in the bill, that notwithstanding said association is in violation of the act of Congress of July 2nd, 1890, said defendants since the date of said act have, and still continue to maintain, the arbitrary rates of freight fixed by the said Trans-Missouri Freight Association to the great injury and prejudice of the public and to the people of the United States.

Then follows the prayer, that the defendants and each of them be enjoined from further agreeing, combining, conspiring and acting together to maintain rules and regulations for carrying freight upon their several lines of railroad to hinder trade and commerce between the states and territories of the United States; and that they be enjoined from continuing in a combination, association or conspiracy to deprive the people engaged in trade and commerce among the states and territories of the United States of such facilities, rates and charges of freight and transportation as will be attained by free and unrestrained competition between said several lines of railroad, and that said defendants be enjoined from agreeing, combining, conspiring and acting together to monopolize or attempting to monopolize freight traffic in the states and territories of the United States, and that all and each of them be enjoined from agreeing, combining, conspiring and acting together to prevent each or any of their associates, in said agreement, from carrying freight and commodities in the trade and commerce between the states and territories of the United States except at such rates as shall be voluntarily fixed by the officers and agents of each of said roads acting independently and separately in its own behalf.

The defendants, the Missouri, Kansas and Texas Railway Company, the Chicago, Kansas and Nebraska Railway Company and the Denver, Texas and Fort Worth Railroad Company have filed answers denying that they were members of the Trans-Missouri Freight Association. The other fifteen companies have each filed a separate answer, but as they are substantially the same, as to

**Defendants  
answer.**

the facts, it will not be necessary to refer to them separately.

They each admit that they are common carriers engaged in transporting persons and property among the several states and territories of the United States and allege that, as such common carriers, they are subject to the provisions of the act of Congress approved February 4th, 1887, entitled, "An act to regulate commerce" with the various amendments thereof and additions thereto, and that said act and the amendments constitute the system of regulation which has been established by Congress for the common carrier subject to said act, and they deny that they are subject to the provisions of the act of Congress, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2nd, 1890.

Further answering the defendants admit that they severally own, control and operate separate and distinct lines of railroad fitted up for carrying on business as common carriers of freight independently and disconnectedly with each other except that common interest exists between certain of the companies named in the answer.

It is further admitted by the defendants that the lines of road mentioned in the bill are lines of transportation and communication engaged in freight traffic between and among the states and territories of the United States, having through lines for freight traffic in that region of country lying west of the Mississippi and Missouri rivers and east of the Pacific Ocean, but deny that they are the only such lines and allege that there are several others, naming them.

It is further admitted that prior to the organization of the Freight Association, the defendants furnished to the public, and persons engaged in trade, traffic and commerce between the several states and territories of the United States and countries named in the bill, separate, distinct and competitive lines of transportation and communication, and allege that they still continue to do so.

It is further admitted that some of the roads mentioned in the bill received aid by land grants from the United States and others received aid from the states and territories by loans of credits, donations of depot sites and rights of way and in a few cases by investments of money, and the people of the said states and territories to a limited extent made investments in the stocks and bonds in some of said railroads, while other of the lines mentioned in the bill, were almost entirely constructed by capital furnished by non-residents of said region.

It is further admitted that the purpose of said land grants, loans, donations and investments was to obtain the construc-

tion of competitive lines of transportation and communication to the end that the public and people engaged in trade and commerce throughout said region of country might have the facilities afforded by railways in communicating with each other and with other portions of the United States and with the world, and denies that they were granted for any other purpose.

Defendants further admit the formation on or about March 15th, 1889, of the voluntary association described in the bill as the Trans-Missouri Freight Association.

Further answering defendants deny that they were not content with rates prevailing at the date of agreement; they deny any intent to unjustly increase rates and deny that said agreement destroyed, prevented or illegally limited or influenced competition; they deny that arbitrary rates have been fixed or charged; they deny that rates have been increased or that the effect of free competition has been counteracted; they deny any purpose in the formation of said association to monopolize the freight traffic or commerce between the states and territories within the region mentioned in the bill and deny that the said agreement is in any respect the unlawful result of any confederation or conspiracy.

Further answering defendants allege that they are subject to the provisions of the act of Congress approved February 4th, 1887, entitled "An act to regulate commerce." In the matter of adjusting rates on their several roads so as to prevent unjust discrimination against persons and localities which involves an adjustment between different companies interested in joint rates and doing business in said region of country requiring preconcerted action between defendant companies, and that this service is the greater part of the work of the association.

The defendants admit that the chairman of the association is authorized to investigate rate cutting and that the articles of agreement provide that he may assess fines for violations thereof but alleges that no attempt has been made to enforce the collection of fines since 1890.

Further answering the defendants allege that the principal object of the association is to establish reasonable rates, rules and regulations on all freight traffic and the maintenance of such rates until changed in the manner provided by law.

It is further alleged that the agreement was filed with the Interstate Commerce Commission as required by section 6 of the act of February 4th, 1887.

Defendants further allege that it is not the purpose of the association to prevent members from reducing rates or changing the rules or regulations fixed by the association, and that

by the terms of the agreement each member may do so, the preliminary requirements being that the proposed change shall be voted upon at the meeting of the association, after which if the proposal is not agreed to the line making the proposal can make such reduced rate notwithstanding the objection of the other lines. That the purposes of this provision is to afford opportunity for the consideration of the reasonableness of any proposed rate, rule or regulation by all lines interested and an interchange of views on the effect of such reduction, and that reductions of rates have been made in many instances, through said process by said association.

It is admitted by the answer that this agreement took effect April 1st, 1889, and that it has since remained operative and that the rates, rules and regulations properly fixed and established from time to time, under said agreement, have been put in effect and maintained in conformity to law, but it is denied that by reason of said agreement, or under duress of fines and penalties, or otherwise, the defendants have refused to establish and maintain just and reasonable rates, and it is alleged that the object of the association, at all times, has been, and is, to establish all rates, rules and regulations upon a just and reasonable basis and to avoid unjust discrimination and undue preference.

The answer further denies that shippers or the public are in any way oppressed or injured by means of the rates fixed by the association, but on the contrary it is alleged that the agreement, and the association established under it, have been beneficial to the patrons of the defendant railway lines, composing the association and the public at large.

A copy of the agreement is set out at length and attached to the answer of the Atchison, Topeka and Santa Fe Railway Company. The case was set down for hearing on bill and answer and the pleadings only are to be considered. The answer, therefore, is admitted to be true in all its allegations of fact even when not stated positively and the defendants only aver that they believe and hope to be able to prove such facts, but the complainant does not hereby admit conclusions of law nor matters concerning which the court takes judicial notice.

The act of Congress of July 2nd, 1890, which it is alleged in the bill, is violated by the agreement to form and the formation of the Freight Association, in the first section declares every contract, combination, in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce, among the several states, to be illegal, and provides for the punishment, by fine

Provisions of  
act of con-  
gress.



or imprisonment, of every person who shall make any such contract or engage in any such combination or conspiracy.

SEC. 2. Declares that every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine or imprisonment.

SEC. 3. Makes the provisions of the first section applicable within the territories and between one territory and another and between a territory and a state and between the District of Columbia and a territory or state.

SEC. 4. Confers jurisdiction upon the several circuit courts of the United States to prevent and restrain violations of the act and makes it the duty of the District Attorneys in the respective districts under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violation.

SEC. 5. Provides for bringing in other necessary parties.

SEC. 6. Provides for the seizure and condemnation of property owned under any contract or combination prohibited by the act and being in the course of transportation from one state to another or to a foreign country.

SEC. 7. Gives a right of action to any persons injured by violations of the act and authorizes a recovery of three fold damages.

The 8th, and last section, provides that the word person or persons wherever used in the act shall be construed to include corporations or associations existing under or authorized by the laws either of the United States or of the territories or of any state or of any foreign country.\*

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\* For convenience we here insert the full text of the Act under which the suit is brought.—Ed.

Chap. 647. An Act to protect trade and commerce against unlawful restraints and monopolies.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled :*

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment

It will be seen from an examination of this statute that its purpose was to reach two evils; first, contracts, combinations or conspiracies in restraint of trade, and second, monopolies. It was urged at the argument that the contract mentioned in the bill and the association formed thereunder, came within the provisions of this act of July 2, 1890, for the reason that it is a contract or agreement in restraint of trade, in that it prevented free competition in the matter of transportation of freight among the several states within the region specified in the bill, counsel for the government insisting that "trade and commerce among the several states of the union is free except as regulated and restrained by acts of Congress, and that no state, municipality, corporation, individual or combination of individuals can by any act or device legally restrain, hinder or retard it. On the other hand it is insisted by the defendants that there is no fixed rule of law by which to determine whether any given contract is in restraint of trade, but that in determining the question, the courts must look to the particular circumstances of each case.

What contracts are in restraint of trade--Conspiracies.

In disposing of this branch of the case I will first briefly refer to some of the decided cases cited by counsels in their briefs.

The case of the *Commonwealth v. Carlyle*, Brightley's Report 36, was a case where certain master shoemakers had entered into an agreement not to employ any journey-

not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court, before which any proceeding under Section 4 of this Act may be pending, that the ends of justice require

men shoemakers who would not consent to work at reduced wages. The purpose being to re-establish wages for this class of labor which had prevailed before that time, but which the defendants had been compelled to advance by reason of a combination among the workmen. The court in deciding the case, said: "Where an act is lawful for an individual it can be the subject of conspiracy when done in concert only where there is a direct intention, that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public, or the oppression of individuals, and when such prejudice or oppression is the natural and necessary consequence flowing from the act."

The case of *People v. Fisher*, 14 Wend. (N. Y.), 9, was an indictment against journeymen shoemakers for conspiring together to fix the price of making boots and establishing a penalty against any journeymen shoemakers who should make boots for a less rate than that fixed by the parties to the agreement, and also agreeing to refuse to work for any master shoemaker who should hire a man who reduced the rates for making boots, and it was held in that case that this was a conspiracy against trade and commerce and as such prohibited under a statute providing, "If one or more persons shall conspire to commit any act injurious to trade or commerce they shall be guilty of a misdemeanor." In passing upon the case, SAVAGE, Chief Justice, said: "The man who owns an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than \$1.00 per pair, but he has no

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that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in Section 1 of this Act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved July 2, 1890.

right to say that no other mechanic shall make them for less. If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations therefore to effect such an object are injurious not only to the individual particularly oppressed, but to the public at large."

*Hooker v. Vandewater*, 4 Denio, (N.Y.) 349, was an action to compel a division of net earnings between several lines of boats engaged in transporting persons and freight on the Erie and Oswego canals. The agreement was that each party should run his line of boats upon these canals during the period of canal navigation in 1842, at rates of freight fixed by themselves from which neither should deviate, and to indicate the interest of each, the respective lines were converted into stock amounting in all to 69 shares. All were to share equally in the net earnings of all the lines in proportion to the number of shares of such stock, and to enforce performance of the contract a common agent was appointed to whom each party to the agreement was to advance and keep good \$35 on each share of such stock, and who was from time to time to receive returns of the business done by each line, and adjust the proportions from the earnings due to each, and out of this common fund to pay and liquidate all such sums as should appear from time to time to be due from one to the other. It was held in this case that the transaction amounted to a conspiracy to commit an act injurious to trade and was therefore illegal and void.

The case of *Stanton v. Allen*, 5 Denio, (N. Y.) 434, was a suit upon a promissory note given as stated upon the face of the note for percentage on tolls for the season of 1843. In this case an agreement had been entered into by the proprietors of boats on the Erie and Oswego canals to regulate the price of freight and passage by a uniform scale to be fixed by a committee chosen by themselves, and to divide the profits of their business according to the number of boats employed by each with a provision in the contract prohibiting the members from engaging in similar business out of the association, and it was held that the tendency of such an agreement was to prevent wholesome competition, and was therefore against public policy and void.

The case of the *Indian Bagging Assoc. v. B. Kock & Co.*, 14 La. Ann. 164, was a contract between several persons engaged in selling bagging to the effect that none of them should sell any bagging without the consent of a majority, and providing a penalty of \$10 for each bale of bagging sold in violation of the agreement, and the action was to recover penalties under the agreement amounting to \$7,400. The

court in that case decided that the contract was a combination in restraint of trade for the reason that its purpose was to enhance the market price of an article of prime necessity to cotton planters, and was therefore contrary to public policy and could not be enforced.

The *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, was an agreement between five coal companies to divide two coal regions of which they had control and to appoint a committee to take charge of their interests, which committee was to decide all questions and appoint a general agent at Watkins, N. Y., the coal mined to be delivered through him. Each corporation was to deliver its proportion at its own cost in the different markets at such time and to such persons as the committee might direct and the committee to adjust the prices and rates of freight. By the terms of the agreement the companies might sell their coal themselves, however, to the extent only of their proportion, the agent to have the power to suspend shipments of either beyond their proportion. Prices were to be averaged and payments made to those in arrear by those in excess. Neither party to the contract, was to sell coal otherwise than specified in the agreement. The action was to recover on a bill of exchange drawn for balances under this contract. It was held that there could be no recovery for the reason that the contract under which the balances were claimed was void as against public policy.

The case of *Craft v. McConoughy*, 79 Ill. 346, was an action for a division of profits under a contract between grain dealers at the town of Rochelle, in Ill., in which it was provided "Each separate firm shall conduct their own business as heretofore and as though there were no partnership in appearance, keep their own accounts, pay their own expenses, ship their own grain and furnish their own funds to do business with; prices and grades to be fixed from time to time as convenient and each one to abide by them. All grain taken in store shall be charged one and one-half cents per bushel monthly, no grain to be shipped by any party at a less rate than two cents per bushel." The court held the agreement void as in restraint of trade, for the reason that while the agreement upon its face seemed to indicate that the parties had formed a partnership for the purpose of controlling the trade in grain, yet from the terms of the contract and other proof in the record it was apparent that the object was to form a secret combination which would stifle all competition and enable the parties by secret and fraudulent means to control the price of grain, cost of storage and expense of shipment, adopting the language of the court, "In other words the four

firms by shrewd, deep-laid secret combination attempted to control and monopolize the entire trade of a town and surrounding country."

In the case of the Central Salt Co. *v.* Guthrie, 35 Ohio St. 666, the contract was for the purpose of regulating the prices and grade of salt. By the terms of the agreement each member of the association was prohibited from selling any salt during the continuance of the association except at retail and then only to actual consumers at the place of manufacture and at the prices fixed by the directors from time to time. The action was to recover the possession of 1000 bushels of salt manufactured under the contract. The court denied the plaintiff's right to recover, stating, "The clear tendency of such an agreement was to establish a monopoly and to destroy competition in trade," and for that reason on grounds of public policy courts will not aid in its enforcement.

The case of the Texas Pacific R. Co., *v.* Southern Pacific R. Co., 41 La. Ann. 970, 40 Am. & Eng. R. Cas. 475, was a suit for specific performance of a contract to divide net earnings between competitive points. The court declined to specifically enforce the contract saying, "That all contracts which have a tendency to stifle competition or to create or foster monopolies with the view of *unreasonably* increasing the market value of commodities are against public interest and contrary to public policy.

The case of *Anderson v. Jett*, 89 Ky. 375, was another case of a contract to divide net earnings and it was there held that where the object or tendency of the agreement was to prevent or impede free and fair competition in the trade, and where the agreement might in fact have that tendency it was void as being against public policy.

The case of *Gibbs v. The Consolidated Gas Co.*, of Baltimore, 130 U. S. 396 was a contract for a settlement between certain gas companies which the plaintiff procured, and for his services in procuring the agreement he sought to recover. The object and purpose of the contract was to regulate the price of gas in the city of Baltimore and provided among other things that the rate should not be changed except by mutual agreement of the parties, and that the entire receipts from the sale of gas should be proportioned and divided between the companies in fixed ratios without regard to the gas actually supplied by either; and also prohibited one of the companies from laying any more pipes for the purpose of supplying the city with gas, and provided that in the future all pipes or mains should become the property of the other company, and also provided that either party violating the terms of the contract should pay to the other company the

sum of \$250,000 as liquidated damages. The court in this case speaking by Chief Justice FULLER, said "Courts decline to enforce contracts which impose restraint, though only partial, upon business of such a character that restraint to any extent will be prejudicial to the public interest."

But when the public welfare is not involved and the restraint upon one party is not greater than protection to the other party requires, such a contract in restraint of trade may be sustained. Thus it will be seen that the question whether or not the contract is prejudicial to public interest is in this case made the test. If it is prejudicial to public interest then it cannot be sustained even where the restraint is only partial, because in contravention of public policy, where it is not it may be sustained. It has been decided in a great many cases that contracts in restraint of trade were perfectly valid even where they prevented the party from engaging in the business which was the subject matter of the contract within the entire state where the contract was made, the test being whether the contract was reasonable and whether or not it was prejudicial to the public interest. The Central Shade Roller Co. *v.* Cushman, 143 Mass. 353; Davis *v.* Mason, 5 T. R. 120. In this case Lord Kenyon in sustaining an agreement restraining a surgeon from practicing his profession within five miles from a certain town said, "That the public were not likely to be injured by the agreement since every other person was at liberty to practice as a surgeon in the town. To the same effect is *Homer v. Ashford*. In the case of the Leather and Cloth Co. *v.* Lhorsont, L. R. 9 Eq. 345, the court in passing upon the validity of a contract in general restraint which extended throughout the whole kingdom, said, "All the cases when they come to be examined seem to establish this principle; that all restraints of trade are bad as being in violation of public policy unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract."

The principle is this: public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labor, skill or talent, by any contract that he enters into. On the other hand public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that

enables him to do that, does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject matter of the contract. See also *Herbert v. Miller*, 27 Mich. 15; *Watertown Thermometer v. Pool*, 51 Hun. (N. Y.) 157; *Gluster Isinglass & G. Co. v. Russia Cement Co.*, 154 Mass. 92; *Beal v. Chase*, 31 Mich. 390; *Diamond Hatch Co. v. Rober*, 106 N. Y. 437; *Oregon Steam Navigation Co. v. Windsor*, 20 Wall. (U.S.) 64.

The case last referred to was a contract in which a party engaged in navigating the waters of California, alone, sold a steamer to other parties who were engaged in navigating the Columbia River in Oregon and Washington territories, and it was agreed between the parties that the purchasers of the steamer should not employ it or suffer it to be employed for ten years from the date of sale, in any waters of California. Three years afterwards the purchasers under this contract sold the steamer to a party engaged in navigating Puget Sound subject to the stipulation that she should not be run or employed on any routes of travel on the rivers, bays or waters of the state of California or the Columbia River and its tributaries for the period of ten years. The supreme court held the contract valid. Mr. Justice Bradley speaking for the court said: "It is a well settled rule of law that an agreement in general restraint of trade is illegal and void, but an agreement which operates merely in partial restraint of trade is good provided it is not unreasonable." Again in the same case the learned justice takes occasion to say that, "cases must be adjudged according to their circumstances and can only be rightly adjudged when the reasons and grounds for the rule are carefully considered. There are two principal grounds upon which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general not to pursue one's trade at all or not to pursue it in the entire realm or country. The country suffers the loss in both cases; the party is deprived of his occupation or is obliged to expatriate himself in order to follow it. A contract which is open to such grave objections is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other



party, it is free from objections and may be enforced."

I think the cases are uniform to the effect that where the contract is publicly oppressive and the restrictions are broader than are necessary for the legitimate protection of the party to be benefited by the contract, then the contract is unreasonable and a contract in restraint of trade and therefore void, otherwise

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petition.**

not. Undoubtedly all contracts which have a direct tendency to prevent healthy competition are detrimental to the public and therefore to be condemned, but when contracts go to the extent only of preventing unhealthy competition and yet at the same time furnish the public with adequate facilities at fixed and reasonable prices and are made only for the purpose of averting personal ruin, the contract is lawful. The rule of law which recognizes the rights of the public to have the benefit of fair and healthy competition and to require that equal facilities and reasonable rates shall be secured to all, does not condemn a contract between railway companies operating competing lines which is made for the sole purpose of preventing strife and preventing financial ruin to one or the other, so long as the purpose and effect of such an agreement is not to deprive the public of its right to have adequate facilities and fixed and reasonable prices. On the contrary such agreements instead of being obnoxious to the law because detrimental to the public interest are to be upheld for the reason that they benefit the public by preventing unjust discrimination among shippers, and providing equal facilities for the interchange of traffic and thus avoiding many of the unfair and unjust results which often follow the unrestricted competition of rival companies.

Applying this rule to the contract, complained of in the case at bar, can it be said that the contract is unlawful? I think not. The allegation of fact in the answer (which is to be taken as true) is that the object and purpose of the agreement and the formation of the association thereunder was to maintain just and reasonable rates and to prevent unjust discriminations, in compliance with the terms of the act regulating commerce, by furnishing equal facilities for the interchange of traffic between the several lines. How then can it be said that the public is injuriously affected by this agreement? The rates or charges are uniform and reasonable and unjust discriminations are prohibited; equal facilities for the interchange of traffic are provided for, hence no right, to which the public is entitled, is violated.

The term competition must not be construed to apply solely to the question of rates. There are many other con-

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not unlawful.**

siderations included within the term. There may be, and as we all know there is very active competition between the railway lines operated within the region described in the bill; each one endeavoring to secure patronage by offering to the public advantages in the matter of equipment, facilities at feeding stations for the proper care of livestock, shortening the time; and in many other ways the most active competition prevails, all of which the public receives the benefit of and so long as the rate charged is fair and reasonable as stated in the answer, which must be construed to mean no more than a fair compensation to the carrier for the services performed, the public cannot complain.

As stated by Christiancy, Justice, in the case of *Beal v. Chase* reported in the 31st Michigan page 521: "The public is quite as much interested in the prosperity of its citizens in their various avocations as it can possibly be in their competition. The latter may bring low prices to purchasers but may also bring them so low that capital becomes unprofitable and business men fail to the general injury of the community." I think that it cannot be said that the public is benefited by competition when that competition is carried beyond the bounds of reasonable prosperity to the parties engaged in it, for surely the citizen investing his capital whether in railways or otherwise, is entitled to the benefit of a contract which affords to him only a fair protection for his investment and which does not interfere with the rights of the public by imposing unjust and unreasonable charges for the service performed. Such contracts, as was stated in the case of *Homer v. Ashford*, "are not injurious restraints of trade but securities necessary for those engaged in trade. The effect of such a contract is to encourage rather than cramp the employment of capital in trade and to promote industry."

Applying this rule to the agreement under consideration my own view is that it is not an agreement, combination or conspiracy in restraint of trade, in violation of the first section of the act of July 2d, 1890.

It is further urged by counsel for the government that this association unavoidably tends to a monopolization of trade and commerce and for that reason is in violation of the second section of the act of July 2nd, 1890.

A monopoly is defined by a Mr. Justice STORY to be, an exclusive right granted to a few of something which was before of common right," and by Lord Coke to be, "An institution by the king by his grant, commission or otherwise to any person or corporation for the sole buying, selling, making, working or using of everything

The contract  
does not  
create a mon-  
opoly.

whereby any persons or corporations are or ought to be restrained of any freedom or liberty they had before or hindered in their lawful trade."

While it is undoubtedly true that these railroad companies perform quasi public functions and for that reason owe certain duties to the public, yet after a careful examination of this contract I must confess that I have been unable to discover in it a single element of a monopoly, especially as defined at common law. While it is true that the public are entitled to adequate facilities and to just and reasonable rates at the hands of these corporations, they are entitled to just that and no more; and the allegation of the answer is, that this was the very purpose of the contract. In view of this allegation, which is to be taken as true in this case, I do not see how it can be said that the contract tends to create a monopoly when by its very terms everything to which the public is entitled is provided for and the public interest fully protected. But it is urged by counsel for the government that this should be held to be a contract tending to monopolize trade and commerce for the reason that its tendency is to prevent free and unrestricted competition. What I have said in reference to competition, in discussing contracts in restraint of trade is equally applicable here. My own view is that the contention of counsel is altogether too broad. The public is not entitled to free and unrestricted competition but what it is entitled to is fair and healthy competition, and I see nothing in this contract which necessarily tends to interfere with that right.

Again it is urged that this contract amounts to the transfer of the franchises and corporate powers of these railway companies and that the contract therefore is forbidden by public policy. There is no doubt but what it is beyond the power of a corporation to disable itself by contract so that it cannot perform every public duty which it has undertaken. Mr. Justice MILLER in delivering the opinion of the court in the case of *Thomas v. West Jersey R. Co.*, 101 U. S. 71, says, "Where a corporation, like a railroad, has granted to it, by charter, a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which it undertakes, without the consent of the state to transfer to others the rights and powers conferred by the charter and to relieve the grantees of the burden which it imposes, is in violation of the contract with the state and is void as against public policy." But wherein the principle

Transfer of  
franchise by  
corporations.

announced in this case can be applied to the contract under consideration, I am wholly unable to perceive. In what manner are the franchises or corporate powers of any of these railway companies transferred to this association? Each company maintains its organization as before; elects its officers; and operates its line in exactly the same manner now as it did before the organization of the association. No powers whatever are given to the association to govern in any respect the operations or methods of transacting the business of any of the lines. Each line is left perfectly free to transact all of the business it can secure and in its own way.

True the contract requires that each company shall charge just and reasonable rates and also contains provision for regulating changes in rates, but wherein is this a surrender of any corporate franchise into the hands of an irresponsible power? The contract provides that this association shall consist of a representative of each of the lines; this representative may or may not be an officer of the company. Suppose we concede that he is not, but is a person appointed by the officers of the company authorized to make such appointment. He then becomes the agent of the company for that purpose and he may lawfully act on its behalf, and hence his act would be the act of the company through its duly authorized agent, and the rate, rule or regulation made by the association and put into effect by any company, party to the agreement, would not be merely the rate, rule or regulation of the association, but a rate, rule or regulation of the company itself acting through its proper officers or agents, and hence no surrender or transfer of any corporate power conferred upon it by its charter, nor would it be thereby relieved of any burden imposed.

One further question remains in this case, do the provisions of the act of July 2nd, 1890, relate to the business of common carriers or in other words does it include, and was it intended to include, combinations or agreements between railway companies? It is urged by the defendants that they are not included within that act; that the provisions of the act operate, and were intended to operate, upon other and different combinations and that they have no application to agreements or combinations between railway companies for the reason that Congress had already provided by the act of February 4, 1887, entitled, "An act to regulate commerce," a full and comprehensive code of railway regulations modeled on the most effective systems of the different states and of England.

*Intention of act to include combinations between railways.*

This last mentioned act may be summarized as follows:

That the provisions of the act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water. It provides that all charges for services shall be reasonable and just; that unjust discriminations and undue or unreasonable preferences shall not be made; that reasonable, proper and equal facilities for the interchange of traffic between lines, and for the receiving, forwarding and delivering of passengers and property between connecting lines shall be provided; that there shall be no discrimination in the rates and charges as between connecting lines; that it shall be unlawful to charge a greater compensation for a short haul than for a long haul, over the same line, in the same direction, under substantially similar circumstances; that there shall be no pooling of earnings. The act provides for the filing and publication of tariffs, including joint tariffs of connecting roads, and also provides for ten days' notice of any advance in rates. The act further provides that any combination, contract or agreement, express or implied, to prevent, by change of time schedules, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination, shall be unlawful. The act provides penalties for violations of its provisions, establishes a commission of five members to exercise a supervisory control over the common carriers subject to the act, and to enforce the provisions of the act.

It will be seen from an examination that this act is in the nature of a special act being confined in its application to common carriers, while the act of July 2nd. is clearly by its terms a general statute. It includes every contract or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade, and every person who shall monopolize or attempt to monopolize any part of the trade and commerce among the states. I think no rule is better settled than that where a general statute has been enacted which might include in the absence of other provisions, a subject matter which has already received consideration at the hands of the legislature by a special act, that the general act will not be construed to embrace the subject contained in the special act unless it clearly appears from the language employed that it was the intention of the legislature that it should be included.

The intention of the legislature should of course be followed, and that is to be ascertained from the words used in

the statute and from the subject to which the statute relates, with a view of meeting the mischief sought to be remedied, and in doing this, it is the duty of the court to restrict the meaning of general words whenever it is satisfied that the literal meaning would extend the statute to cases which the legislature never designed to include. As stated by Mr. Justice DAVIS in the case of *Reiche v. Smythe*, 13 Wall. (U. S.) 164: "If it be true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject matter to which it relates; there is an equal duty to restrict the meaning of general words whenever it is found necessary to do so in order to carry out the legislative intention." It is equally the duty of the court to give to these statutes such a construction that both may stand, if that can be done. Applying these rules, can it be said that it was the intention of Congress to include common carriers subject to the act of February 4, 1887, within the provisions of the act of July 2nd? I think it very clearly appears from an examination of these statutes, and considering the evil sought to be remedied, that such was not the intention of Congress.

The whole subject relating to common carriers had already been carefully provided for by the act of February 4, 1887, and a commission appointed, whose duty it was to see to it that the carriers subject to that act complied with its requirements with power to the courts, when necessary, to enforce its provisions; hence it is but reasonable to presume that if congress had considered anything in addition necessary, for the proper regulations and control of these carriers, it would have provided for it by an amendment of that act instead of including it in a general statute, some of the provisions of which would necessarily conflict with the legislation then in force upon a subject which had already received the special consideration of Congress. I think it was the purpose of Congress to remedy a very different evil then existing. A number of combinations in the form of trusts and conspiracies in restraint of trade had sprung up in the country which were dangerous to its commercial interests, for example the Steel Rail Trust, Cordage Trust, the Whiskey Trust, the Standard Oil Trust, Dressed Beef Trust, The School Book Trust, the Gas Trust and numerous other trusts and combinations which threatened to destroy the commercial and industrial prosperity of the country. These trusts assumed the absolute control of the various corporations entering into them, directing which of the constituent members of the trust should continue operations and which should cease doing business; how much business should be

transacted by each; what prices should be charged for their product, and in fact had the power to direct every detail of the business of every corporation forming the trust. It was to combinations and conspiracies of this sort that the act of July 2nd, 1890, was directed.

I conclude that the bill should be dismissed and it is so ordered, but not at the cost of the complainant.

**Railway Traffic Associations are not Trusts—Construction of Congressional Anti-Trust Act.\***—Taking the Act of Congress as it stands and giving it the widest possible interpretation, admitting for the sake of the argument that it includes combinations between railway companies, we proceed to demonstrate our second proposition, viz. †

*The agreement of March 15, 1889, between the defendants is neither a "contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states," nor by virtue of it do the defendants "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states." The agreement, therefore, is not a violation of the Act of July 2, 1890.*

The agreement in question is substantially set out in the bill, and a verbatim copy is annexed to the answer. To determine whether in itself, or taken in connection with what has been done under it, a violation of the Act is shown, requires an examination of the different provisions of the Act, particularly sections 1 and 2, the different provisions of the agreement, together with the allegations of the bill and the denials and averments of the answer. The case having been set down on bill and answer, it stands upon the record as made by the parties in their pleadings.

The Act of July 2nd, 1890, under which this suit is brought, contains three penal sections, in which certain things are forbidden and certain penalties denounced against those who do the forbidden things. Analyze these sections and those that follow, and you get the following:

1. Section 1 declares every contract, combination in the form of trust or otherwise, or conspiracy *in restraint of trade or commerce* among the states, or with foreign countries, to be illegal, and then attaches the penalty.

2. Section 2 declares and creates a misdemeanor. It provides that every person who shall *monopolize* or attempt to *monopolize*, or conspire with any person to monopolize any part of the trade or commerce of a state with another state, or with foreign nations, shall be deemed guilty of a misdemeanor, and attaches a penalty.

3. The third section simply applies the provisions of the first section to combinations and conspiracies in territories and between one territory and another, or between a territory and a state; or between the District of Columbia and a territory or a state; but Congress seems to have forgotten to say anything about the offense of monopolizing in such places.

4. Section 4 makes it the duty of the District Attorneys, under the di-

\* This Annotation consists of a portion of the very able brief filed in the above case by GEORGE R. PECK, General Solicitor for the Atchison Railroad System. Mr. Peck's brief contained such a thorough and exhaustive argument that it was concurred in and adopted by most of the counsel for the other roads.—ED.

† The first portion of the brief is an elucidation of the proposition that the Act does not apply and was not intended to apply to combinations between railroads.—ED.

rection of the Attorney General, to restrain violations of the Act, and provides the procedure.

5. Section 5 provides for bringing in other parties when necessary.

6. Section 6 provides for the seizure and condemnation of property owned under any contract or combination prohibited by the Act and being *in the course of transportation* from one state to another or foreign country.

7. Section 7 gives a right of action and a recovery of threefold damages by any person injured by a violation of the act.

8. Section 8 provides that the word person or persons, as used in the act, shall include corporations or associations.

It will be seen that the prohibitions of the act relate to two things, and only two. In whatever form the contract, agreement, combination or conspiracy forbidden by the act may be, it must, in order to fall within the act either, first, be *in restraint of trade*, or second, it must *monopolize* or attempt to *monopolize*.

The question then arises: What do these terms mean?—for without knowing their meaning, we cannot know what the act intended to prohibit and to punish.

**No Definition in the Act.**—It will be observed at the outset that Congress did not define what acts should constitute a restraint of trade, a monopolization or attempt to monopolize. It simply took two common law terms and incorporated them into the statute. Whatever "restraint of trade or commerce" meant at the common law it means in this statute. Whatever "monopolize" and "attempt to monopolize" meant at common law, they mean in this statute. There being no common law of the United States, such combinations and acts as are prohibited by the statute, were not before illegal in the sense of being against the laws of the United States. Whatever illegality attached to them was of a local character, and within the jurisdiction of the particular state in which they were committed.

This brings us, then, to a point in the discussion where we presume there will be no disagreement between the government and ourselves, viz: that whatever in the way of restraint of trade or commerce, or of monopolizing, is illegal at the common law, is illegal under this statute, and not otherwise.

Patterson, in his work on Contracts in Restraints of Trade, says, (page 52):

"The public outcry against these vast combinations of capital, in the form of trusts or otherwise, whose only object was the enhancement of prices, by limiting production or by driving weaker competitors to the wall, by temporarily underselling them, led to the passage, by congress, of the National Trust Act (1890), the first section of which makes it a misdemeanor for any person who shall make a contract or engage in any combination in the form of a trust or otherwise, in restraint of trade, among the several states or with foreign nations, and punishable by fine or imprisonment, or both. This section, then, merely makes such contracts and combinations criminal offenses, and leaves the question as to whether the contract is in restraint of trade and void, *the same as it was at common law*. \* \* \*

"The only change, therefore, that the passage of this Act makes in the law of contracts in restraint of trade is, that if such a contract is void *at common law*, and is within the province of the Federal jurisdiction, then it is a misdemeanor to be a party to it, and is punishable as prescribed by the Act." (Page 53.)

**Distinction between Restraint of Trade and Monopolizing.**—Restraint of trade, at the common law, meant that restriction upon freedom of action, which, first, deprived the public of the restricted party's industry, and sec-



ondly, precluded the restricted party from pursuing his occupation, and thus prevented him from supporting himself and family. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64.

A monopoly was originally a grant by the crown to certain persons or corporations of the exclusive right to carry on some business, trade, or avocation. Such grants were, in the case of *The Monopolies*, Coke's Reports, prt. 11, 86, declared to be illegal. In that case one Darcy had been granted the exclusive right to buy beyond the sea all such playing cards as he thought good, and to make and sell them within the Kingdom, and that he and his agents and deputies should have the whole traffic and merchandise in playing cards, and that no other should have the right of making playing cards within the realm. "All trades," said the court, "as well mechanical as otherwise, which prevent idleness (the bane of the commonwealth), exercising men and youth in labor for the maintenance of themselves and their families and for the increase of their substance, to serve the Queen when the occasion shall require, are profitable for the commonwealth, and, therefore, the grant to the plaintiff to have the sole making of them is against the common law, and the benefit and liberty of the subject."

The struggle of the English People against monopolies culminated in the passage of the Act 21st James I, by which they were prohibited. In a legal sense, monopoly, at the present day, simply means the obtaining, without a grant from the sovereign, of the exclusive power to carry on a certain trade or business, and is usually brought about by buying in all competitors or all commodities pertaining to the particular business, and thus attaining, though in a much less degree, the same result as if an exclusive grant had been made. Of course, in a popular sense, the term monopoly is applied, as we all know, to every large and successful business enterprise, but we apprehend it will not be claimed, certainly not held, that because an enterprise has attained large proportions it is, in a legal sense, a monopoly. Railways, national banks, and corporations of all kinds are sometimes characterized by the public as monopolies.

**Contracts in Restraint of Trade.**—We will now apply the test of the legal definitions we have given of restraint of trade and monopolies to the Trans-Missouri Association. Is the Trans-Missouri Association an organization in restraint of trade or commerce? Later we shall inquire whether it constitutes a monopoly. As we have shown, restraint of trade has a well settled legal meaning. An indispensable element of restraint of trade, in its proper legal sense, is that one or more of the parties to the contract must agree to go out of business, and surrender that which before belonged to him or them to the other parties making the agreement. It is an old and familiar form of agreement, well known to the common law, and has been before the courts in a great variety of aspects, but in nearly every case the vicious element in the agreement has been the stipulation that one or the other of the parties should go out of business, either wholly or partially, and not re-enter it. The cases range themselves into two classes: First, where the agreement not to pursue a business is determined territorially; and, secondly, where it is measured by time. In the first class of agreements the party agrees not to engage in the business anywhere, or not in certain specified *territory*. In the second class of agreements the party agrees that he will never carry on the business, or that he will not for a certain given time carry it on. These agreements have been condemned or upheld, according to the circumstances of the case; the decision of the court usually turning upon the question whether the restraint under the agreement was total or partial, or whether it was for the whole territorial extent of the kingdom, or for only a part. Public policy changes, and, therefore, any contract alleged to have been in restraint of trade has been

upheld or condemned upon what may be called the political or economic policy of the country at the time the case was decided. But whatever may be the public policy at any given time, and whether contracts alleged to be in restraint of trade have been upheld or not, we wish to emphasize as a well settled doctrine that contracts in restraint of trade involve a diminution of the number of persons engaged in trade, or of the supply furnished the public.

Applying this principle to the contract between the defendants, constituting the Trans-Missouri Freight Association, and to the statute under which this suit is brought, it will be seen that the agreement is clearly not within the first section, which prohibits restraint of trade. The public has lost nothing in the matter of service either of individuals or of the corporations comprising the association. The philosophical basis of the doctrine of restraints of trade is entirely wanting. And this enforces what we have before said in this brief, that the statute aims at an entirely different class of economic wrongs. It aims at those contracts by which one person or corporation, engaged in some productive industry, agrees to abandon it, so that the field may be left to the control of a rival; it aims at contracts by which the owner of a furnace, or a factory, or a warehouse, or a distillery, agrees to shut it down for a year, or five years, or permanently; it means a throwing out of employment of a large number of workers, while the man who controls the "corner" waits for an advance in prices. In other words, it means the very things the act intended to destroy, viz: trusts.

The methods pursued by these great organizations to prohibit which, as we have shown, this statute was enacted, are well known. They have been pursued under the public eye, and the people of the entire country are familiar with their modes of operation. Undoubtedly their plans, as devised and carried out, often bring them within the meaning both of restraint of trade and monopoly, but the common law treats these as different things, and the statute does the same.

One of the great leading cases on restraint of trade is *Mitchell v. Reynolds, I. P. Wms.*, 181, in which Chief Justice PARKER, afterwards Lord Macclesfield, held that *general* restraints of trade were void, but *partial* restraints of trade, if made upon a good and adequate consideration, were valid. He gives the foundation of the doctrine of restraints of trade in this language: "The true reasons of the distinctions upon which the judgments in the case of voluntary restraints are founded are, the mischief which may arise from them, first, to the party by the loss of his livelihood and the subsistence of his family; secondly, to the public by depriving it of a useful member."

As public policy is the standard by which contracts alleged to be in restraint of trade must be measured, it is not strange that there has been a wide diversity of opinion in the different cases which have come before the courts, and the result is this; *that courts look to the particular circumstances of the case, making no iron clad rule, but judging whether, on the whole, any given contract alleged to be in restraint of trade is, or is not, against public policy in that respect.*

The most recent writer on this subject says: "The doctrine of public policy is not a fixed unbending rule of law. Public policy from its very nature must change from year to year with the habits and customs of the people. Because something was opposed to public policy at one time, it does not necessarily follow that it will be hostile to it at another. At one time in England it was deemed public policy to prohibit the exportation of gold from the kingdom; such a regulation now would be deemed of doubtful expediency. 'If,' said Sir George Jessell, in *Printing Company v. Sampson*, 'there is one thing more than another which public policy

requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice.' The objection to contracts in restraint of trade is based upon public policy, and as public policy varies, so the test as to the validity of such a contract must vary, and it is impossible to lay down a limit beyond which the restraint of a contract may not extend on account of public policy." Patterson on the Law of Contracts in Restraint of Trade, 17.

In *Fowle v. Parke*, 131 U. S., 88, the following language is used by Chief Justice FULLER: "As we remarked in *Gibbs v. Consolidated Gas Co.*, 130 U. S., 396-409, the decision in *Mitchell v. Reynolds*, 1 P. Wms., 181 s. c., Smith's Leading Cases, Vol. 1, Part 2, 508, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible and has been considerably modified. Public welfare is first considered and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not reasonable. (*Rousillon v. Rousillon*, 14 Ch. D., *Leather Cloth Co. v. Lonsant, L. R.*, 9 Eq. 345. *Oregon Steam Navigation Company v. Winsor*, 20 Wall., (U. S.) 64-68.)"

See also for a recent exposition of the doctrine, the case of the *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

In *Beal v. Chase*, 31 Mich., 490, one of the most learned and exhaustive opinions on the subject of restraints of trade ever given in an American court was filed by Christiancy, J. The case grew out of a provision in a contract for the sale of a printing and publishing establishment and a stipulation of the vendor that he would not engage in business in the State of Michigan so long as the vendee should continue in the business at the place of sale. The opinion collects the cases, English and American, and deduces from them the doctrine that the contract in question was perfectly valid, not against public policy, and that every case must stand upon the reasonableness of the restraint made by the contract and by the particular circumstances of the case. From this and many other cases which might be cited, it is clear that no fixed and inflexible rule can be laid down by which the validity of a contract supposed to be in restraint of trade may be determined.

The more enlightened opinion, as evinced in the later cases, confirms strongly the opinion expressed tentatively by Justice MAULE (*Proctor v. Sargent*, 2 Scott's N. R., 289, 302), "that the public would be better served if, by permitting restraints of this kind, encouragement were held out to individuals to embark large capitals in trade."

The mere fact that a contract places a restriction upon trade or competition is not sufficient to avoid it. *Shrinka v. Sharinghausen*, 8 Mo. App. 522, 525.

In *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 363, 364, the Supreme Court of Massachusetts sustained a contract for the control of the sale at fixed prices of certain shade rollers, ALLEN, J., said: "But we cannot assume that the purpose and effect of the combination are to *unduly* raise the price of the commodity. A natural purpose and a natural effect are to maintain a fair and uniform price, and to prevent the injurious effects both to producers and customers of fluctuating prices caused by undue competition." A restriction may be general—e. g., embracing Great Britain—and yet, if under all the circumstance it is reasonable, and not plainly injurious to the public, it will be sustained. *Rousillon v.*

Rousillon, L. R., 14 Ch. Div. 366, 369. See also *Leather Cloth Co. v. Lonsont*, L. R. 9 Equity, 345, 354; *Hubbard v. Miller*, 27 Mich., 15, 20, 21; *Watertown Thermometer Co. v. Pool*, 51 Hun, (N. Y.) 157, 163; *Perkins v. Lyman*, 9 Mass. 522; *Gloucester Isinglass & G. Co., v. Russia Cement Co.*, 154 Mass., 92, 94; *Jones v. Clifford's Exec'r*, 5 Fla. 510, 515, 516; *Master Stevedores' Assoc. v. Walsh*, 2 Daly, (N. Y.) 1, 11 & 12; *Collins v. Locke*, L. R. 4 App. Cas. 674, 685, 687.

In the three cases last cited, agreements among workmen, (pilots and stevedores), to maintain the prices of their labor by restraining competition among themselves and with others, were upheld.

Upon consideration of all these decisions it will be found that this is the true rule: An agreement is not void on the ground that it is in restraint of trade, unless the restriction is broader than is necessary for the obligee's protection, unless it expressly and unquestionably contravenes public policy, and is manifestly unreasonable under all its circumstances.

*As to Public Corporations.*—But it may be claimed that a different rule applies when contracts between corporations which owe a duty to the public are involved. Undoubtedly railroad companies perform *quasi* public functions, but it is also true that they are, in their operation, subject to public control as to rates, and as to the manner in which their duties are performed; so that whatever agreements they make between themselves, the public has always a degree of protection which it does not have in respect to agreements between private parties. The Anti-Trust act is not intended, and does not profess, to enforce public duties; it is a general act applicable to individuals as well as to corporations, and as it makes no distinction in the penalties imposed, it is plain that so far as the act is concerned, it does not place corporations engaged in public duties, on any different plane from individuals or corporations engaged in purely private pursuits. If it be a more serious offense for railway companies to make a contract in restraint of trade, than it is for private persons, then we have a right to believe Congress would have imposed a more serious penalty upon them than upon private individuals—conceding for the sake of the argument that railway companies are included in the act. The truth is that in respect to railway companies the same doctrine applies as that which determines the responsibility of private persons entering into contracts which are claimed to be in restraint of trade: *both must be tested by their reasonableness as judged by the circumstances of the particular case.*

We gave a definition of the term restraint of trade, showing that it combined the two elements of injury to society by the loss of service, and injury to the individual by reason of his being prevented from earning a livelihood. This definition was taken from the opinion of Justice BRADLEY, speaking for the Supreme Court of the United States, in *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. (U. S.) 64, in which the contract involved was made by a common carrier and not by a private individual. It thus appears that the foundation of the rule is the same whether the party entering into the contract is a corporation performing quasi-public duties, or a strictly private person or corporation. This is so at common law; and obviously it is so in the Anti-Trust Act, which includes persons and corporations of all kinds in one general and sweeping provision.

The supreme court of the United States, in the case of the *Oregon Steam Navigation Co. v. Winsor*, *supra*, held a contract to be valid in which it appeared that A, engaged in navigating the waters of California alone, sold in 1864 a steamer to B, engaged in navigating a particular river (the Columbia) of Oregon and Washington Territories, subject to a stipulation that he, B, would not employ it or suffer it to be employed for ten years from the date of the sale in any waters of California, and B three years at-

terwards sold the steamer to C, engaged in navigating Puget's Sound, subject to the stipulation that she should not be run or employed on any of the routes of travel, or the rivers, bays or waters of the State of California, or the Columbia river and its tributaries, for the period of ten years.

The rule was also applied with reference to common carriers in the cases of *Leslie v. Lorillard*, 110 N. Y., 519, 532, *et seq.*, and *Ives v. Smith*, 3 N. Y. Sup., 645, 653-4.

The case of the *Manchester & L. R. Co. v. The Concord R. Co.*, (N. H.) 47 Am. & Eng. R. Cas. 359, a recent decision by the supreme court of the State of New Hampshire, is an exceedingly clear and exhaustive discussion of the entire subject of traffic contracts between competing railroads. It furnishes a complete answer to what is stated in the bill and will be stated in the argument for the complainant, on the subject of competition. Later, we shall discuss competition and shall show that the view entertained by the government that free and unrestricted competition is a fundamental right of the people, is not and never was the law. It is sufficient now to say that what the public is entitled to is *fair* competition, and not "*free and unrestricted competition*," and both the rights and the interests of the public are harmed, and not benefited by what the government calls free and unrestricted competition. The supreme court of New Hampshire, in the case just mentioned, used the following language: "The second plea avers, and the demurrer of course admits, that at the time of the making of the contracts between the parties, and of the dealings thereunder, their respective roads 'were rival and competing railroads, by the competition of which the prices of transportation thereon were, and, but for said supposed contracts, dealings, transactions, operations, and business would have continued to be materially reduced, and said alleged contracts, dealings, transactions and business were made and had for the purpose of destroying and preventing such competition, and did destroy and prevent it.' It will be noticed that there is no averment in the plea that the purpose of the contracts was to raise the prices of transportation above a reasonable standard, or that they did have this effect, or that the public were prejudiced by their operation in any manner; and the naked question presented then is, whether all contracts between rival railroad corporations which prevent competition are necessarily contrary to public policy; and therefore *mala prohibita* and illegal in themselves. To state this question is to answer it in the negative, because it is obvious that the illegality depends upon circumstances."

We shall have occasion to refer to this opinion in a subsequent discussion of another question.

The same subject was discussed some years ago in England in the case of *Shrewsbury & B. R. Co. v. London & N. W. R. Co.*, in 2 Mac. & Gor., 324, decided in 1850 on a bill for specific performance, in which Lord Cottenham on demurrer decided in favor of the validity of the agreement. The agreement substantially provided that the two companies should make and keep separate and distinct accounts of all passengers, freight, etc., which such companies or either of them should convey from Shrewsbury or Wellington or any other point between those two places, to Rugby, or to any place to the south of or on the London side of Rugby, and also all freight etc. which such companies or either of them should carry from Rugby to Wellington or Shrewsbury, or to any point between those last named places; and the other company in like manner to keep like accounts, and the companies should make out half yearly accounts of the above matters, and such sums, when so ascertained, should be divided between said two first companies as one party, and said last company as one party in given proportions; and further, that said first two companies

would not compete for any traffic which properly belonged to the last company. The bill was for a specific performance and injunction to restrain the breach of the contract. The demurrer was argued before Lord Chancellor Cottenham, in the High court of chancery, on appeal from the decision of the Vice-Chancellor. On pages 353 and 354 the Lord Chancellor says: "Now, the plaintiffs having a railway which it was their duty to protect for the benefit of their constituents, had a very natural fear that they might be very much injured by so powerful a company as the L. & N. W. Railway Co. having a line in competition with theirs, they, in point of distance, being so convenient. Their duty to their subscribers was, as far as possible, to secure, by all lawful means, the most traffic they could get. They were apprehensive that they would lose their traffic, and under these circumstances they entered into an arrangement with the L. & N. W. Railway Co. by which the two companies agreed not to compete with each other; but, having ascertained how many passengers had gone by their respective railways, then to divide the profits arising from that traveling in certain proportions between them. This must have appeared to them, as it does to me, a beneficial arrangement for the minor company. It was no violation of duty by the directors, and there is nothing in it of which the subscribers can complain. \* \* \* The other part of the contract is that the L. & N. Ry. Co. shall not carry passengers from Shrewsbury to Gnosall, or to Stafford, there being from Stafford a line actually existing, and from Gnosall a line in contemplation, which might bring passengers down to Wolverhampton or Birmingham. \* \* \* I see no illegality in this. It does not interfere with the direct traffic, but only to that indirect traffic which could be resorted to merely for the purpose of depriving the plaintiffs of that which they anticipated would be the natural result of the line they had established. The defendant, the L. & N. W. Railway Co., being under no obligation to carry passengers in the way objected to, it is quite obvious there can be nothing illegal in making an agreement by which they abstained from exercising their power to do so."

On page 356 of the report of the case it appears that the defendant had lowered its tolls between certain points to take trade from the plaintiff and thus violate the contract. Subsequently an issue was made up in this case to be sent to the judges of the Common Law court, for their opinion upon the legality of this contract. It came before Lord Campbell, chief justice, Patterson, Coleridge and Wightman, judges, and was decided in 1851, and reported in 17 Ad. & Ell. (N. S.), 652, in which that court held that the agreement was legal.

In 1861 the question again came up for consideration in the case of *Hare v. London & N. W. R. Co.*, 2 John. & Hemm., 80. There, two groups of railway companies, being respectively the owners of independent continuous routes, agreed to divide the profits of the whole traffic in certain fixed proportions calculated on the experience of past course of traffic. It was held that such an agreement, being *bona fide*, was not *ultra vires*. A bill was filed by a shareholder of the L. & N. W. Ry. Co. for an injunction to restrain the company from carrying the agreement into effect. Sir W. Page Wood, Vice-Chancellor, on page 103, says: "It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard." On page 107 he says: "Though it may not, in one sense, be for the immediate advantage of the public, inasmuch as it may tend to raise fares, it is, nevertheless, in the end beneficial, by preventing the ultimate raising of fares as the consequence of ruinous competition, and also by promoting the convenience of travelers." On page 114 he continues: "Lord Cottenham's decision, independently of the very great authority of that learned judge, must be

regarded as an especially strong authority for this reason: When the merits of Lord Cottenham as an equity judge come to be weighed hereafter, one of his marked characteristics will be found to be the skill and boldness with which he accommodated the practice of the court to new commercial exigencies."

In *Ex parte Koehler, Receiver*, in the Circuit court of the United States for Oregon, 23 Fed. Rep. 529, 21 Am. & Eng. R. Cas., 57, which was a case involving a pooling contract, a much more odious form of railway combination than the traffic contract, and which is now by the Interstate Commerce Commission positively forbidden, Judge DEADY says: "Pooling freight or dividing earnings is resorted to by rival and competing lines of railway, as a means of avoiding the cutting of rates, which, if persisted in, must result in corporate suicide. It is not apparent how a division of the earnings of two such roads can concern or affect the public, so long as the rate of transportation on them is reasonable." He thereupon ordered the receiver to carry out the agreement.

**Monopolizing.**—Much that has been said on the subject of restraint of trade is equally applicable to the subject of monopolizing. The statute names both, but as before stated, there is a difference at common law between the two which we have pointed out. An examination of the agreement between the different companies, constituting the Trans-Missouri Freight Association, discloses not a single element of a monopoly at common law. An agreement in respect to rates alone, even if it went to the extent of agreeing to raise them, could not be held to be a contract in restraint of trade within the meaning of that term as settled in common law; nor, measured by the same common law test, could it be held to establish or intend to establish a monopoly. It seems to be forgotten by the government, that the prices charged by common carriers for service is subject to governmental control and regulation, and subject further to the ancient doctrine of the common law that they must be *just and reasonable*. Each of the railway companies composing the Trans-Missouri Freight Association is subject to the control of the Interstate Commerce Commission; all tariff sheets and all agreements with each other, must be filed with the Interstate Commerce Commission, and the answer shows that the very agreement which is attacked by the bill, is on file with the Interstate Commerce Commission.

Still further, it appears from the agreement and from the admitted allegations of the answer, that the purpose of the agreement was not to *raise* rates, but to establish and maintain just and reasonable rates; and to establish just and reasonable rates is a right which belongs to every railroad company in the United States, and is particularly and specifically required by the Interstate Commerce Act. *It can never be legally wrong to contract for what is legally right.*

Reasonable rates are legal; they are lawfully chargeable for service; and no contract whose scope does not go beyond *reasonable rates* can be outside the sanctions of the law. The bill complains that under the agreement, the defendants have established what the government is pleased to call, "arbitrary rates"; but surely the learned law officers of the government cannot be ignorant of the fact, that rates *must* be arbitrary, and are required by law to be arbitrary. It is an offense under the Interstate Commerce Act to change rates without notice, or to give varying, flexible, and if we may use the term, *un-arbitrary* rates. This case can never turn on, the question whether a rate is arbitrary or not; if it be *just and reasonable*, neither the government nor the public nor individual shippers, can object to it.

There is no claim made in the bill that by reason of the agreement the public are deprived of any facilities to which they are entitled; all the

roads are in full operation, and as shown by the pleadings, the public are served for just and reasonable rates; how, then, can it be claimed that a monopoly has been established or that the people have been or can be oppressed?

In *Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372, a bill was filed by a stockholder of one of the companies to avoid an agreement for the continuous transportation of passengers and freight over the lines of the Lake Superior and Mississippi River Railroad Company and the Lake Erie and Western Transportation Company. The agreement provided that the through rates on freight and passengers for transportation eastward were to be fixed by one of the parties, and for transportation westward by the other party, and that these rates should be divided according to a fixed proportion; that these through rates, to use the language of the agreement, "shall so far as the competition of rival lines will permit, be made fairly remunerative to both parties." The agreement then prohibited the parties, except by mutual consent, from making rates that would not yield at least "\$2.25 per ton to the party of the first part and \$4 per passenger"; and a complete schedule of prices for both freight and passenger service was provided. On page 396 the Supreme Court of the State of Minnesota said: "But while it could hardly be claimed that any monopoly in the sense of exclusive privilege of carrying to and from the railroad, is in terms provided for in this contract, the plaintiff contends that the practical effect of the contract is to confer such monopoly upon appellant. This objection brings up once more the propositions which we have so often reiterated as of paramount importance in this case, viz: first, that it is competent for the railroad company to enter into contracts with connecting carriers for the purpose of providing for through transportation over its road and the routes of such carriers, such contracts being made with a *bona fide* purpose to regulate traffic in a reasonable and just manner; and, second, that this contract is, upon this appeal, to be assumed to have been made *bona fide* and with the purpose of providing for through transportation over the connecting routes of the contracting parties. Now admitting, as appears to be the fact, that the contract in this case, though not conferring upon the appellant a monopoly of running in connection with the railroad, does secure to and confer upon the appellant special privileges, the practical result of conferring which *may* be to enable the appellant to monopolize the lake carriage connected with the railroad, it does not follow that the contract is therefore against public policy and void. Still keeping in mind the two propositions so often repeated, the question still recurs, can this court say as a matter of law, that this contract which is presumed to have been made with a *bona fide* purpose to regulate traffic was not made in a reasonable and just manner, and is not reasonably calculated to accomplish such purpose? We think that this question must be answered in the negative."

In *Ontario Salt Co. v. Merchants Salt Co.*, 18 Grant's Ch. (U. C.), 540, it appeared that several incorporated companies and individuals, engaged in the manufacture and sale of salt, entered into an agreement, whereby it was stipulated that the several parties agreed to combine and amalgamate under the name of "The Canadian Salt Association," for the purpose of successfully working the business of salt manufacturing and to further develop and extend the same, and which provided that all the parties to it should sell all salt manufactured by them through the trustees of the association, and should sell none except through the trustees. It was held that this agreement was not void as contrary to public policy or as tending to a monopoly or being in undue restraint of trade. Thereupon, the contract was enforced.

In *Wickens v. Evans*, 3 Y. & J., 318, it appeared that A, B, and C, rival  
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box and trunk makers, for the purpose of preventing the inconvenience and loss from all doing business in the same places, divided England into three districts, each taking one, and the other two engaging not to carry on any business in such district. This agreement was held to be valid. The object of the parties was to put an end to the great loss and inconvenience which each of the parties sustained by reason of their exercising the trade in the same places. In the opinion, the court said: "This is the mischief and evil recited in this agreement, and what is the remedy they propose? Not a monopoly except as between themselves, because every other man may come into their districts and vend his goods. All they propose is, that they shall not carry on a rivalry, nor continue any longer to trade throughout the country."

In *Mogul Steamship Co., Lim., v. McGregor, Gow & Co. L. R., 21 Q. B. Div., 544*, it appeared that the defendants, who were a firm of shipowners trading between China and Europe, with a view to obtaining for themselves a monopoly of the homeward tea trade, and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of five per cent. on all freights paid by them. The plaintiffs, who were rival shipowners trading between China and Europe, were excluded by the defendants from all the benefits of the association, and in consequence of such exclusion, sustained damage. It was held that the association, being formed by the defendants with the view of keeping the trade in their own hands, and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will toward them, was not unlawful, and that no action for a conspiracy was maintainable.

The same rule was applied in the *Eclipse Tow-Boat Co. v. Pontchartrain R. Co., 24 La. Ann. 1*, a case similar in many respects to the preceding one.

From the cases, and from reason itself, which is the foundation upon which the law must rest, it is clear that the contract in question, even admitting that the Anti-Trust Act is broad enough to include combinations between carriers, is not of that character which the act forbids; it is not in restraint of trade, nor does it establish a monopoly; for, as we have seen, it lacks the essential elements of either.

**Competition in its Legal Aspects.**—Much is said in the bill, and will doubtless be said in the argument, on the subject of competition, though this word is not used in the Anti-Trust act. Whatever relation competition has to this case, is purely in respect to its bearing upon the legal doctrine of restraint of trade and monopolies. Competition is an exceedingly general term. The government insists that it is to be free, unregulated and unrestricted, and that this is what the public is entitled to; that all the forces of competition shall be given unlimited play, and that if persons or corporations engaged in business take any step whereby the play of competition is in any manner restricted, limited, regulated or modified, public rights are thereby violated. We respectfully submit that this is not the law; and that it was not the law even at the time when the public policy of England regarded it with most favor. As we have had occasion to say before, public policy is a variable thing; and no man accustomed to the accurate use of language can now claim that free and unrestricted competition is the public policy of this country or of England. Has any case been pointed out—can any case be pointed out, which holds that restraint upon competition is, without regard to circumstances, *ipso facto*, illegal and void? No such cases exist; nor do the reasons, upon which rules of law are based, permit that any such doctrine should ever be established.

When Adam Smith promulgated his great theory of competition, the world hailed it as a beneficial discovery. But that was more than a cen-

tury ago. Within the memory of men of middle age now living, all the systems and methods of carrying on business have changed; steam, electricity and the other powerful agencies which science has brought to the aid of modern life, have reconstructed the theory not only of Adam Smith, but the theories, political, social and economic, of many other great lights of history. Competition between small tradesmen, limited to narrow localities, is an entirely different thing from the competition between the great factors of modern commerce; and as methods and agencies change, public policy changes and the laws change with it. But, as we have before shown, even in Adam Smith's time the doctrine of free and unrestricted competition was not adopted or followed by the courts.

In truth, no such legal doctrine ever existed. Competition was always a legal public right; but *free, and unrestrained* competition, like unregulated liberty of any kind, has always belonged to the literature of *doctrinaires* and theorists and never to the sober and sensible jurisprudence of the Anglo-Saxon race.

In the case of *Kellogg v. Larkin*, 3 Pinney (Wis.), 150, in a learned and elaborate opinion by Howe, Judge, it was said: "If it be true, also, that competition is the life of trade, it may follow such premises, that he who relaxes competition commits an act injurious to trade; and not only so, but he commits an overt act of treason against the commonwealth. But I apprehend it is not true that competition is the life of trade. On the contrary, that maxim is the least reliable of the host that may be picked up in every market place. It is, in fact, the shibboleth of mere gambling speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century, competition in trade has caused more individual distress, if not more public injury, than the want of competition.

Indeed, by reducing prices below, or raising them above values (as the nature of the trade prompted), competition has done more to monopolize trade, or to secure exclusive advantages in it, than has been done by contract. Rivalry in trade will destroy itself, and rival tradesmen seeking to remove each other, rarely resort to contract, unless they find it the cheapest mode of putting an end to the strife. And it seems to me not a little remarkable, that in the case of *Stanton v. Allen*, 5 Denio, 434, it should have been urged against the agreement, that its object was to exempt the standard of freights, etc., from the wholesome influence of rivalry and competition. For it is very certain that because of that very purpose, because they did not tend to protect the party against the influence of rivalry and competition, courts of law have upheld like agreements in partial restraint of trade, ever since the case of *Mitchell v. Reynolds*, *supra*, was decided."

In *Perkins v. Lyman*, 9 Mass., 522, the court said: "Instead of an injury to the public the community may receive benefit from such procedure, as it will go to prevent the trades being overdone and so becoming profitable to none."

Also, in the case of *Leslie v. Lorillard*, 110 N. Y., 519, Judge GREY said: "I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to be an evil."

Again, in *People v. North River Sugar Refining Co.*, 22 Am. & Eng. Corp. Cas. 511, when tried before Judge BARRETT, at the Circuit, he said: "Excessive competition may sometimes result in actual injury to the public, and competitive contracts to avert personal ruin may be perfectly reasonable. It is only when such contracts are publicly oppressive that they become unreasonable and are condemned as against public policy."

In the late case of the *National Benefit Co. v. Union Hospital Co.*, 46 Minn., on page 275, Judge MITCHELL, speaking for the Supreme court, says: "And again, modern investigations have much modified the views

of courts, as well as political economists, as to the effect of contracts intending to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common law doctrine in regard to contracts in restraint of trade largely grew out of the state of society and of business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions—both English and American.”

The Supreme Court of New Hampshire in the case of *Manchester & L. R. Co. v. Concord R. R. Co.*, (N. H.) 47 Am. & Eng. R. Cas. 359, already referred to, discusses this doctrine of unregulated competition with so true an appreciation of its meaning, and its consequences, that we quote at some length from the opinion: \* \* \* \* \*

Judge COOLEY—at that time Chief Justice of the Supreme Court of Michigan—in an article in the *Railway Review*, April 26, 1884, on the subject of Traffic Pooling, says: “It is a familiar principle in the law that contracts in general restraint of trade are void. Therefore if a man contracts with his rival in business that for any agreed consideration he will no longer pursue his customary calling within the state in which he resides, the promise is one he may keep at pleasure, or break with impunity. The reasons are that such a contract if enforced would deprive the public of the benefits of competition, and at the same time impose restraints going far beyond what would be needful for protection to the party bargaining for them. But it was always agreed that competition, in so far as it operated injuriously to individuals, might with entire competency be limited by contract; and in a great variety of cases it has been held that a man may lawfully bargain to put an end to an injurious competition in his business in the locality where he carries it on, or that he may bargain to prevent the establishment in that locality of a competing business which he fears may be injurious. It is only when he exacts terms that go beyond giving him protection that the law holds his contract to be unreasonable, injurious to the public, and therefore illegal. The reader unfamiliar with the law reports will find many of the cases referred to in the note; and it will appear on an examination that in all of them *the legality of bargaining to limit competition, when it is kept within the bounds of reasonable protection, is either assumed or expressly affirmed.*”

In the same article Judge COOLEY says: “The principal danger to be guarded against is the cutting of rates. In the unregulated and unreasonable strife between railroad companies this cutting is not only carried on to an extent that is ruinous to the companies themselves, but it becomes a disturbing factor in all commerce, and it is perfectly correct for the railroad companies to say, as they do when defending pooling, that unjust discriminations are a necessary result. The sort of competition which is the ‘life of trade’ in a war of rates, incites every agent to make secretly and by every form of indirection such terms as will secure the business; it is inevitable that these shall be without uniformity, and that those who push the hardest and bargain most—which will generally be the large shippers—will be most favored. Low rates, when they can be depended upon for any considerable time, increase the prices of grain and other market commodities in the hands of producers; but they affect prices little if at all when it is uncertain from day to day and from hour to hour what they are to be, and consequently such benefits as come from the hostile cutting of rates are reaped principally by speculators and other

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\* The lengthy quotation of several pages given in the brief is omitted, since the opinion will be found reported in full in vol. 47 Am. & Eng R.Cas. p. 359, —Ed.

large shippers. It is doubtful if the shipping interest ever receives benefits equivalent to the losses which the railroad interest suffers in a war of rates, and the benefits to the general public will seldom equal the incidental injuries. Nothing, therefore, can be plainer than the desirability that reasonable rates should be maintained with general uniformity, so that they may be calculated upon in the making of contracts and purchases, and so that small shippers as well as large, the man who merely sends his household goods as well as the speculator in grain and provisions, may have the benefit of them."

In another part of the article he says: "Such a state of things can exist in no business from which a transfer of capital is possible; and the competition it creates instead of being 'the life of trade,' is as to this business destructive of the capital invested in it. It becomes a matter of necessity then, that the competition which is so likely to be destructive should be restrained within the limits which will admit of reasonable and reliable prosperity; and some common arrangement between the roads seems to be the only means yet found by which this can be accomplished."

In another portion of the article, Judge COOLEY points out what so many people forget; that there is a wide difference between capital invested in railway enterprises and capital invested in ordinary business pursuits. He says: "In most kinds of business, competition easily and naturally regulates the extent to which a business shall be carried on; persons engage in it only when they think they see a reasonable opening for profit; they push the business with men and money when the promise of success is such as to warrant it, and when it is not, operations are reduced; some, perhaps, go out of the business, and capital seeks other investments. The merchant, when competition becomes too severe for him, may turn farmer or manufacturer; the manufacturer may change his line of production or temporarily reduce it; and these changes it is generally possible to make without serious loss. Very seldom the whole plant for one business will be useless for any other. The general results of competition will therefore be such that, while the public will have the benefits of low prices, a general equilibrium of demand and supply will be maintained without bringing disaster to individuals. Much of this is as different as possible in the railroad world. The investment for the purposes of a railroad is permanent, and is available to a single purpose only. If it cannot be made available for the transportation of persons and property it is a wasted investment, as much so as if it had been cast into the sea. But when the construction of railroads is entirely unrestricted, there is always a tendency to build more than are needed, and more than can be made profitable. The reasons for this are numerous. Railroads are a great local convenience; every village wants one or more; and it is easy for plausible men, who see individual profit in their construction, to convince the local community that a road which will accommodate their local needs must be profitable. \* \* \* Roads have thus in many cases been constructed at general expense in which a capitalist for the purpose of investment would put nothing. But roads are also built under an expectation, on the part of those who originate and push them, that in some way the originators will be enabled to make them available for their individual benefit, regardless of their real value; sometimes through holding the control and managing them; sometimes by forcing the owners of other roads to which they would be rivals to buy them."

These extracts, which we have quoted at considerable length, make clear the limitations upon combinations between carriers, which the law from time immemorial has placed upon them, namely, that whatever agreements they may make between themselves, the public always has this protection: that they can only charge just and reasonable rates. Private parties, if

competition reduces profits below a reasonable remuneration, are at liberty at any time to go out of business, or to engage in some other business; while railway companies, by virtue of their public character, must continue to do business whether the result of it is a profit or a loss. Free and unrestricted competition was never a legal doctrine; and instead of being a wholesome and salutary principle is the most destructive agency known to modern commercial life. Taken in moderation, and with reason, it is a wholesome tonic; taken in free and unrestricted quantities, it is a deadly poison.

Here it is pertinent to inquire of the officers of the government who bring this suit, how they reconcile their doctrine of absolutely free and unrestricted competition as a part of the present common law, with the universal tendency to combination, not simply among railways, but in every department of business. It is a part of the age. We may as well look facts squarely in the face. Without some freedom of agreement, some liberty of combination, the right to unite and the right to come together for the protection of common interest, there can be no health and no strength in our industrial or commercial life. We have all heard something of the Farmers' Alliance, and of the proclamations said to have been sent out from the headquarters of that organization recommending the producers of grain and the other necessities of life to unite in holding them from the market until an advance in prices is brought about. Something we know, also, of organizations into unions, brotherhoods and trades assemblies, with the avowed purpose of self protection, even to the destruction of rival interests. There is not a town or city in the United States in which there are not organizations among merchants and others for mutual protection of their common interests. On every railroad in the country there are numerous organizations of employes, whose avowed purpose is to secure and maintain in themselves the best attainable wages. If free, unrestricted and unregulated competition be the birthright of every citizen, will the government inform us why every citizen is hastening to array himself against that kind of competition? Let us not be deceived. The truth is, combination is the balance wheel of modern industry. Without it, in the fierce, implacable struggle of the times, no interest, whether agricultural, commercial or mechanical, can survive; and the people, wiser than the politicians, have instinctively recognized the truth.

In line with the obvious facts, against which no one can close his eyes at the present time, is the almost universal demand of the people to be defended from "free and unrestrained competition." Anti-Alien laws have been passed to protect American laborers from debasing European competition. The Chinese have been excluded by laws, whose rigor and severity can be defended on no other ground than the dangers of "free and unrestricted competition." An Anti-Alien Land law has been enacted by Congress applicable to all the Territories of the United States, for the protection of American farmers from the competition of European capital and the European tenant system. And import duties are levied with the avowed purpose of shutting out foreign competition, thereby enhancing the wages of workmen, and preserving American markets for the exclusive use of the American people. All of these statutes are against the doctrine of "free and unrestricted competition." They rest upon another and sounder basis, namely, the great right of self-protection. The laws mentioned above—and many more could be named—are all violative of the doctrine of absolute freedom of competition. They mark and illustrate the condition of the public mind upon the economic questions of the age. We have reached the time when association, unity of action and co-operative effort are indispensable, and when, if commercial and industrial forces do not unite, they cannot survive. And this necessary and salutary

co-operation was never intended to be prohibited by the Anti-Trust Law or by any other Congressional enactment.

*The Position of the Government in this Suit is Opposed to its own Construction of the Law, as Made by the Tribunal Specially Charged with the Administration of Railway Affairs.*—No one entrusted with the management of governmental affairs ever fell into a more grievous error—manifest, open and transparent—than have the law officers of the United States in this case. Not only is the suit inconsiderately brought, but, if we may be pardoned for saying so, a little study of the case, a small effort in the industry which should have been given to it, would have shown not only that it ought not to have been begun, but that it amounts to an attempted perversion—of course, unintentional—of the law, and of the principles and processes by which laws are administered. We shall show that the Interstate Commerce Commission, whose whole duty is to enforce the law, whose investigations have given them the ripened knowledge that comes from experience, have established the most intimate relations with Traffic Associations; have relied upon them as useful and indispensable aids in the administration of the interstate traffic of the country; have commended their efforts to establish harmonious relations among themselves and with the public, and have during the entire period since the enactment of the Interstate Commerce Act, looked to them as useful and salutary organizations for the public welfare.

No examination can be made of the agreement establishing the association without disclosing that all its provisions are in the direct line of the Interstate Commerce Act, aiming at the same benefits, and directed against the same evils. In the first place, Congress has, as we have seen, authoritatively spoken on the subject of railway regulation in the enactment of the Interstate Commerce Act, and the act does not contemplate "free and unrestricted competition" as a right belonging to the public; on the contrary, the various provisions of the act requiring railway companies to enter into relations with each other; authorizing the commission to determine the reasonableness of rates; authorizing the commission to suspend the operation of the long and short haul clause; and, in short, all of the regulative provisions of the Interstate Commerce Act show the intention of Congress to bring the entire railway system of the country *into one harmonious and uniform system*. In pursuance of this act, the commission has from time to time acted: and from its organization to the present day, has striven to secure *uniformity* and *certainly* of rates, and has constantly held as the greatest of all public evils in railway management, what is known as wars of rates. And what is a war of rates? Simply the application of the principle of free and unrestricted competition.

Discrimination is another of the great evils prohibited by the Interstate Commerce Act; and what is the most fruitful source of discriminations? Undoubtedly the unrestrained and relentless competition for which the government contends in this case. Give full and unrestricted sway to the kind of competition the government asks for here, and there can be but one result; cities and towns, which are not competitive points, must necessarily suffer in the struggle with their more favored rivals that are competitive points because, whether railroads compete or not, towns and cities, particularly in the great West, which is the theater of operations of the defendant companies, will compete. As all thoughtful minds have long since realized, what communities and commercial interests most need, is certainty and stability, coupled, of course, as the law requires, with reasonableness and equality. Traffic associations are the most useful and necessary auxiliaries to the administration of railway affairs by the Interstate Commerce Commission. Uniformity of classification is to-day the *desideratum*, most needed and most sought for, both by the Interstate Com-

merce Commission, and by the commercial public, and uniformity of classification is a simple impossibility, except by the united and harmonious efforts of railway companies.

We shall devote considerable space—we could devote more without exhausting the material—to the acts and opinions of the Interstate Commerce Commission, on this subject.

It will appear with great distinctness, that the Interstate Commerce Commission, whose whole time is given to the administration of the law on this subject, are unfit for their places, are ignorant of their duties and false to their oaths to enforce and execute the law, if this suit can be maintained. It is even worse than this; for if what is claimed in this suit is the law, all the members of the commission should be impeached for misconduct in office, and turned out of their positions. If the government is right *here*, it is wrong in the entire administration of the Interstate Commerce Act. The law requires the commission to make reports every year; reports which constitute a record of their acts and doings, and which the law requires to be laid before Congress, and to this record we invite the attention of the court. \* \* \*

From the above extracts, taken from the official records of the Interstate Commerce Commission, we find:—

1. That the Commission in the performance of its duties maintains close and intimate relations with the various Traffic Associations of the country.
2. That it has repeatedly expressed its obligations to such Associations for aid and assistance in carrying out the Interstate Commerce Act.
3. That it is to-day, and has been for years, recognizing the Associations not only as perfectly lawful bodies, but as almost indispensable in the administration of the railway traffic of the country.
4. That it regularly issues circulars, orders and regulations to such Associations.
5. That since the passage of the Anti-Trust Act, and while its provisions have been in full force and operation, the Interstate Commerce Commission has maintained its relations with such Traffic Associations undiminished and unimpaired.

The Interstate Commerce Commission, let it be remembered, is a body of sworn Government officers, specially and particularly required by their oaths of office to know the law governing the operation of railways engaged in interstate commerce, and to see that it is enforced. We have taken pains to give these various expressions of the views of the Interstate Commerce Commission, not because they were necessary, but because they make it so clearly appear how unwisely and improvidently this suit was brought.

As executive officers of the government in the control of railways, what they have said and done on this subject amounts to an executive construction of the existing laws on the subject, and as such will be followed by the courts, except upon the most clear and conclusive showing that it is erroneous. *Brown, Admx. v. United States*, 113 U. S. 568-571.

Summing up all that is shown by the reports of the Commission we call the attention of the court to the significant fact,—and we think it would be well for the law officers of the Government to consider it,—*that the only criticism upon the Associations, to be found any where in the reports, is that they have not in all cases lived up to their articles of agreement as closely as they ought.*

## .WEIDENFELD

v.

SUGAR RUN R. CO. *et al.**(U. S. Circuit Court W. D. Pa., Jan. 7, 1892, 48 Fed. Rep. 615.)*

**Delegation of Power to an Executive Committee to Locate Route.**—Where the by-laws of a railroad company provide for the appointment of an executive committee, and further provide "that such a committee shall have a general supervision of the operations and policy of the company, and shall have power to authorize the execution by the president, secretary or treasurer, of such contracts or agreements as said executive committee may deem expedient," such authorization has reference only to the conduct of the ordinary business operations of the company, and does not extend to such important acts as the direction and approval of the location of its lines of railroad, since by statute (Act Pa. Feb. 19, 1849) the duty of location of the road, is imposed upon the president and directors of the company, and this discretion cannot be delegated, nor can the board of directors approve and ratify the unauthorized action of its officers in making such location, as against the rights of another railroad company which may have attached to the property in question prior to such ratification.

**Eminent Domain—Public Use—Railroad for Private Benefit.**—Where it is shown that a railroad is to be built solely for the private use of a controlling stockholder, the company is not entitled to exercise the right of eminent domain, even though it is organized under the general railroad law (Act Pa. April 4th, 1868) entitled "an act to authorize the formation and regulation of railroad corporations," and its promoters profess that its organization is for a public purpose.

**Jurisdiction of Federal Courts to Restrain Illegal Acts.**—Under a statute (Act Pa. June 19th, 1871) which provides that in proceedings in courts of law or equity in which it is alleged that the private rights of individuals or of corporations are injured or invaded by any corporation claiming a right or franchise to do the act from which such injury results, the court may inquire and ascertain whether such corporation does in fact possess the right or franchise to do the act, and, if such rights or franchise have not been conferred on such corporation, such courts by exercising equitable powers shall by injunction, at suit of the private parties or other corporations, restrain such injurious acts. *Held*, that this equitable right may be administered by a court of the United States.

**Rights of Stockholders—Rival Railroad—Collusion of Directors.**—A stockholder of a railroad company which has located, and partially constructed, its lines, may maintain a bill to enjoin a rival company from appropriating its work to its own use, when he shows that the directors of his own company are acting in sympathy with the rival company.

**IN EQUITY.** Bill to restrain appropriation of right of way.  
*C. Walter Artz*, for complainant.

*H. C. Dornan* and *John Ormerod*, for defendants.

**REED, J.**—The complainant's bill shows that, in a proceed-



ing in the circuit court for the northern district of New York between the same complainant and the Allegheny & Kinzua Railroad Company, S. S. Bullis, and Mills & Barse, as defendants, a preliminary injunction was granted on the 18th of July, 1891, restraining those defendants from interfering or aiding any interference with the Interior Construction & Improvement Company in the execution of its duties under certain agreements with the defendants, and from constructing or aiding the construction of any competitive or other line of railroad, in violation of said agreements. That among the lines of railroad proposed to be constructed under said agreements was what is known as the "Sugar Run Branch of the Allegheny & Kinzua Railroad," which was designed, among other things, to reach certain timber land of Messrs. Bullis and Barse, which they had agreed to place under the lien of a mortgage given to secure the bondholders of the Allegheny & Kinzua Railroad Company, and from which branch the latter company expected to derive a large revenue in transporting the timber and bark coming from said lands. That subsequently, in November, 1891, the Sugar Run Railroad Company, the defendant in this case, was incorporated, and the route of its railroad surveyed and located in greater part over the route of the Sugar Run Branch of the Allegheny & Kinzua Railroad.

That the Sugar Run Railroad Company was organized by A. A. Healy and others named as defendants, in collusion with the said Bullis, with the especial purpose of evading the injunction of the said circuit court. The charge of collusion is denied both by the answers of the defendants and by their affidavits, and has not been established by the plaintiff. While there is enough shown to lead to the conclusion that the officers of the Allegheny & Kinzua Railroad, and particularly its president, Mr. Bullis, have regarded with complacency the organization of this rival railroad, and its appropriation of the route and grading of one of the branches of their railroad, and while they have made no effort to protect the interests of their company, yet, so far as shown, the defendant company has been organized and is proceeding with its work as a separate enterprise, and its promoters are acting in independence of Mr. Bullis or the Allegheny & Kinzua Railroad. The injunction cannot be continued on this ground.

In this connection it may be said that the defendant Healy is the owner of a large quantity of bark, which he reserved in a sale of timber land to Bullis in 1887, and which the defendants allege he is anxious to transport to his tanneries,

and therefore he and his associates are constructing the defendant company's railroad with that object in view; Mr. Bullis and his assignee, the Allegheny & Kinzua Railroad Company, having failed, according to the terms of the agreement between Messrs. Bullis and Healy, to construct said railroad and transport said bark. So far Mr. Healy seems to be acting for his own protection and in his own interest, and not in the interests of Mr. Bullis.

The plaintiff further contends, however, that, as a stockholder of the Allegheny & Kinzua Railroad Company, he is entitled to ask that its rights in the Sugar Run branch be protected; that it had located this branch, and had graded and cleared several miles of its route, which work the defendant company has appropriated, and is preparing to lay its railroad in part upon this graded roadbed. The defendant company claims priority of location and title, as between itself and the Allegheny & Kinzua Company, to the route; and its counsel contend that under the law of Pennsylvania it is entitled to appropriate this route regardless of the work done by the latter company. It appears from the affidavits that the actual location in behalf of the latter company was made by the Interior Construction & Improvement Company, the contractor for the construction of its lines of railroad. The line as located by the contractor was approved by the executive committee of the Allegheny & Kinzua Railroad Company, but was never authorized or approved by its board of directors. The by-laws of the latter company provide for the appointment of an executive committee, and provide "said committee shall have a general supervision of the operations and policy of the company, and shall have power to authorize the execution by the president, secretary, or treasurer of such contracts or agreements as said executive committee may deem expedient." This authorization has reference only to the conduct of the ordinary business and operations of the company, and does not extend to such important acts as the direction and approval of the location of its lines of railroad. The statute of Pennsylvania, (Act Feb. 19, 1849,) under which this railroad company acts in the construction of its railroad, imposes the duty of location upon the president and directors of the company; and this discretion cannot be delegated, nor can the board of directors approve and ratify, the unauthorized action of its officers in making such location, as against the rights of another railroad company, which may have attached to the property in question prior to such ratification. Appeal of New Brighton R. Co., 105 Pa. St. 13; Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co., 141

Locating  
route.

Pa. St. 407, 47 Am. & Eng. R. Cas. 224. This question can only arise between two corporations having the right of eminent domain. If the defendant company has this power, and is entitled to its exercise, then, as between it and the Allegheny and Kinzua Railroad Company, it would seem entitled to the location, because, as appears, its board of directors have proceeded with the location of its line in the manner prescribed by the statute; and this is so, although the other company has actually done work upon the ground. *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, *supra*; *Titusville & P. C. R. Co. v. Warren & V. R. Co.*, 12 Phila. (Pa.) 642; *Davis v. Titusville & O. C. R. Co.*, 114 Pa. St. 308, 30 Am. & Eng. R. Cas. 341.

It becomes important, then, to ascertain what rights and powers the defendant company possesses. It is organized under the general railroad law of Pennsylvania, being the act of assembly approved April 4, 1868, entitled "An act to authorize the formation and regulation of railroad corporations." Its articles of association state that it is to be constructed and maintained for the term of 10 years, from Sugar Run Junction, McKean county, Pa., to Sugar Run Station, on the river division of the Western New York & Pennsylvania Railroad, in Warren county, Pa., a distance of about 12 miles. Its authorized capital is \$120,000, or 1,200 shares, of \$100 each. Of this capital stock 269 shares have been subscribed, 250 of which are subscribed for by A. A. Healy, 10 shares by Mr. Lewis, his attorney, and the remaining 9 shares by 9 persons. The Allegheny & Kinzua Railroad Company has the right under its charter to build the Sugar Run branch over the route in question, the defect being, as stated, in the location of its line upon the ground; and the complainant contends that the defendant company is a private enterprise for the benefit of the defendant Healy; that he is attempting to use the powers conferred by the statute for his own private purpose; and that the Allegheny & Kinzua Company, or the complainant as a stockholder in the latter company, have such standing as to be able to raise the question.

The affidavits read on behalf of the defendants, of Messrs. Lewis, Healy, and Brown, the statements of Mr. Healy to Messrs. Smith and Byrne, as stated in their affidavits, and the communication of Mr. Roberts to the councils of the city of Bradford, set forth in the affidavit of A. G. McComb, satisfy me that the purpose of the organization of the Sugar Run Railroad Company was a private one, namely, to reach and transport the bark belonging to or purchased by the firm of Healy & Sons for use at their tanneries. Although its promoters profess that it is organized for a public pur-

pose, yet they have failed to show any public use or necessity for the railroad, nor any public traffic that it will obtain when constructed. Messrs. Healy and Brown admit that their purpose in subscribing to the stock was to secure a means of reaching the bark they needed for the tanneries; and as the stock is held by themselves, their attorneys and business associates, it is probable that their motive in subscribing to the stock actuated all the subscribers for one share each. The company is organized for the short term of 10 years, and is manifestly intended to meet a temporary necessity. It follows, therefore, that its stockholders are endeavoring to use its corporate powers, including that of eminent domain, for a private purpose.

Whether the use is a public one, for which private property may be taken, is a judicial question. If the use itself is found to be only private, or, further, if, the use being public, the appropriation can in no respect be Public use subservient thereto, it is the duty of the judicial department to protect the citizen by proper remedies from the taking of his property, whether attempted in open disregard of or under color of law. *Pierce, R. R.* 146; *Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403. By a statute of Pennsylvania, (Act June 19, 1871,) it is provided that, in proceedings in courts of law or equity, in which it is alleged that the private rights of individuals or of corporations are injured or invaded by any corporation claiming a right or franchise to do the act from which such injury results, the court may inquire and ascertain whether such corporation does in fact possess the right or franchise to do the act, and, if such rights or franchise have not been conferred on such corporation, such courts, if exercising equitable powers, shall by injunction, at suit of the private parties or other corporations, restrain such injurious acts. This equitable right may be administered by a court of the United States. *Holland v. Challen*, 110 U. S. 15. In the case of *Appeal of Edgewood R. Co.*, 79 Pa. St. 257, it appeared, as in this case, that a number of persons had procured a charter for a railroad company, and, under cover of constructing a railroad for public use, were engaged in the construction of a railroad from a tract of coal owned by themselves to the Pennsylvania Railroad. A bill was filed by a property holder to restrain the appropriation, by virtue of the power of eminent domain conferred upon the railroad company, of a portion of his property for its uses.

The supreme court of Pennsylvania, finding the facts to be that the railroad was projected and constructed with the primary object of connecting the coal mines with the Penn-

sylvania Railroad, held that the railroad was being constructed for private purposes under cover of a charter obtained under the general railroad laws of the state; that there appeared a perversion of an enactment passed for one purpose, in order to subserve other and inconsistent purposes; that the charter of the defendant company did not warrant the appropriation of the land of the plaintiff for the purpose to which the defendant had applied it; and that it did not possess the right or franchise to do the acts which had resulted in the injury of which the plaintiff complained. In appeal of Western Pennsylvania R. Co., 104 Pa. St. 399, the same court, commenting upon the Edgewood R. Co. Case, said:

"A charter authorizing the building of a public railroad did not warrant the construction of a purely private one.

\* \* \* The question was one of corporate power, and that question was determined by the inspection of the charter of the company proposing to exercise the power."

In the present case it is stated in the affidavits that deeds for this land, upon which the Allegheny & Kinzua Company has partly constructed its railroad, are in the possession of its officers, but, however that may be, it is in possession of the land, and has by that possession sufficient interest to question the right of the defendant company to dispossess it and appropriate the land.

One other question was raised, namely, the right of the complainant to maintain the bill in this case as a stockholder

**Rights of a stockholder.** of the Allegheny & Kinzua Company. The bill contains the averments required by the ninety-fourth rule in equity, that the complainant was a stockholder at the time the transactions took place of which he complains, and that the suit is not a collusive one. It further alleges that the officers and directors of the Allegheny & Kinzua Company are not only not acting for the interests of their corporation, but are acting in sympathy with the defendants interested in the Sugar Run Company; that the defendant Bullis and his associates thus acting are a majority of the board of directors, and own a major portion of the stock of the company; that they are now acting in such bad faith and disregard of their duties.

Mr. Smith's affidavit shows that the board refused to direct steps to be taken to resist the appropriation of the property of the company and interference with its rights, and Mr. Bullis has been seen upon the line with the president of the Sugar Run Company since the latter company commenced work. It also appears that the information as to defects in location was furnished to the officers of the latter company.

by the officers of the Allegheny & Kinzua Company. The complainant, as a stockholder, is injured by these unlawful acts on the part of the Sugar Run Company, with the consent and acquiescence of the officers and directors of his company. It is clear that this is a real grievance, and a real and meritorious application by the complainant to prevent a wrong to the corporation within the ruling of Justice HARLAN in the case of *County of Tazewell v. Farmers' Loan & Trust Co.*, 12 Fed. Rep. 752. In a previous case between the same complainant and the Allegheny & Kinzua Company and its directors, the complainant was seeking as a stockholder to settle the contract relations between that company and the Interior Construction Company, of which he was an officer, and his charges against the officers of the railroad company grew out of those contract relations. This court then thought he had not shown such standing, in view of the requirements of rule 94, as to sustain his bill. *Weidenfeld v. Allegheny & K. R. Co.*, 47 Fed. Rep. 11.

This is a different case. No contract relations are involved in this case. The attempt is to strip the company of its property, in which the complainant as a stockholder has a direct interest, and there is such a disregard of duty and non-performance of manifest official obligation, amounting to what the law considers a breach of trust, that it is a case in which the stockholder has a right to interfere. It does not involve a discretion as to the bringing of suit which ought properly to be left to the judgment of the board of directors or of the majority of the stockholders, for here a portion of the corporate property and the exercise of the franchises of the company over the route in question are in jeopardy, and its officers, in disregard of their duty, are consorting with its enemies, and furnishing them with information as to the defects in its rights to the use of the route. While the question is not entirely free from doubt, yet I think sufficient is shown by the complainant to give him standing in this application.

A preliminary injunction should issue, therefore, restraining the Sugar Run Railroad Company, its officers, agents, contractors, and employees, from interfering with the line of the Sugar Run Branch of the Allegheny & Kinzua Railroad Company, as projected and partly graded. So far as the restraining order relates to construction by the Sugar Run Railroad Company of portions of its railroad which do not interfere with the line of said branch, it should be dissolved; otherwise it should continue in force until the writ of injunction issue, which should only be upon the filing by the complainant of an injunction bond, in the sum of \$10,000, to in-

demnify the said Sugar Run Railroad Company, with sureties to be approved by the court. And it is so ordered.

**Eminent Domain—Public Use—Condemning Land for Railroads Used for Private Advantage.**—See *Ex parte Bacot* (S. Car.) 50 Am. & Eng. R. Cas. 597; *Colorado E. R. Co. v. Union Pac. R. Co.* (C. C.) 44 Am. & Eng. R. Cas. 10, note 25.

**Location of Road—Necessity for Taking Land.**—When a railroad locates its line across certain land, it is *prima facie* proof of the necessity for its appropriation, in the absence of anything showing or tending to show that the taking of the land for that purpose was unreasonable. *O'Hare v. Chicago, M. & N. R. Co.* (Illinois, Oct. 31, 1891), 28 N. E. Rep. 923.

**Appropriation of One Railroad's Land by Another—When Authorized.**—When public necessity demands, a railroad company may appropriate so much of the least valuable part of another railroad company's yard as may be necessary for the supports of an elevated road, when the proposed terminus cannot otherwise be reached, and compensation can easily be made in damages. The court said: "In the case in hand the appellee seeks to cross appellants' yard, not at grade, but by an elevated road, which will occupy no portion of the yard except for its necessary supports. That it will occasion some inconvenience to the appellants is probable, but for that it can be compensated in damages. It will certainly do them less injury than by any other form. While vested rights are to be sacredly guarded, the public interests must not be overlooked, and nothing in the way of mere obstructions can be permitted to interfere with the public convenience. In the present case we have the facts found by the master and approved by the court as follows: 'This road goes through the defendants' extensive freight yards at its least valuable part, and in such a way as to take but a trifle of the defendants' land, and so as not in any considerable degree to restrict or embarrass any of the defendants' use or enjoyment, nor in the future, of said yard, for any of the purposes to which it is applied, or for which it is held.' 'The occupation of the yard as proposed will cause some inconvenience and interference with the defendants' operation and use of the yard, but not to any considerable or serious degree, nor lessen to any appreciable extent the capacity of its accommodation for the defendants' use.' 'The entire injury to the defendants would comparatively be inconsiderable, and could be easily compensated for in damages.' 'The plaintiff cannot by any other route whatsoever reach its terminus at Eleventh and Ninth streets.' These findings are fully sustained by the court below as warranted by the evidence. Giving to them the weight of a verdict, it will readily be seen how entirely this case differs from those cited. Railroad corporations are the creatures of the public, and were created to serve the public in the matter of transportation of freight and passengers. It is not too much to require them to submit to a slight inconvenience where the public interests are concerned, especially where such inconveniences can be compensated in damages. Their franchises, like other property, may be taken by the public, for the public welfare, where there exists a necessity for such taking. We have interfered repeatedly where such an attempt has been made without an actual necessity therefor. In the case in hand we think such necessity does exist, and the slight inconvenience to the appellant company must yield to the public good. The law as applicable to this case has been discussed so fully and so recently that we need not repeat it here. The decree is affirmed, and the appeal dismissed, at the costs of the appellant." *Pittsburgh Junction R. Co. v. Allegheny Valley R. Co.*, 146 Pa. St. 297.

**Equity Will Not Interfere Where There is an Adequate Remedy at Law.—**

In condemnation proceedings of a portion of a highway for railroad purposes, persons having a reversionary interest in the land, or who will be specially injured by an obstruction of the highway, have an adequate remedy at law, by making themselves parties to, and asserting their rights in, the condemnation proceedings, and they cannot resort to suit in equity to enjoin the condemnation proceedings. *Conner v. Covington Transfer R. Co.* (Ky., May 28, 1892), 19 S. W. Rep. 597.

**Entry by Railroad not Stayed by Writ of Error by Land-owner.**—Where a statute confers upon a railroad the right to enter upon condemned lands upon paying the amount awarded by the commissioners, such right of entry is not stayed by the suing out of a writ of error by the owner of the lands. "The proofs showed that there was an understanding that, pending the negotiations for a settlement, no legal steps should be taken by either to the prejudice of the other, and that defendant had delayed suing out his writ of error, relying upon it, and that the suing out of that writ of error stayed the defendant's right to proceed to pay the money and take possession. I held that the defendant was entitled to stand before the court precisely as he would have done if he had sued out his writ of error *instantly* the judgment was entered on the verdict. But I also held that the writ of error did not in any degree affect the complainant's right to take possession upon paying the amount found by the jury. The 12th section of the general railroad act (Revision, p. 928, par. 100) provides that, upon paying the amount awarded by the commissioners, the railroad company shall be entitled to enter, etc. The legislature might have stopped here, and given an appeal from the award without staying the right to take possession. Such provision was made in many of the old special charters, and is found in section 7 of the general waterworks act, (Revision, p. 1366, par. 44.) and I venture the suggestion that such was the intention of the draughtsman of the general railroad law, but his language has been, very properly, of course, construed otherwise, and it has been held that the provisions of section 13 (Revision, p. 929, par. 101) postponed the right of possession in case an appeal be taken before payment, until after verdict. *Johnson v. Baltimore & N. Y. R.*, 45 N. J. Eq. 454, 39 Am. & Eng. R. Cas. 101. But there is nothing in the nature and effect of a writ of error to stay the complainant's right. It will not stay execution of an ordinary judgment unless bail be given. Here the legislature has declared that, upon paying the verdict, the railroad company shall have the right to enter, etc., and it nowhere says that such right shall be stayed by a writ of error." *Packard v. Bergen Neck R. Co.*, 48 N. J. Eq. 281.

51 A. & E. R. Cas.—33



*In re* SPLIT ROCK CABLE-ROAD CO.

(128 New York 408.)

**Eminent Domain—Private Railroad—Public Use.**—Where an elevated tramway corporation organized under N. Y. Laws 1888, chap. 462, instituted condemnation proceedings it appeared that the southerly terminus of petitioner's line was accessible only by a private road, and that its railroad had been used solely for the transportation of stone for a private corporation in which the incorporators of petitioner were financially interested, though it was claimed that the company was ready to carry freight offered to it by any person, providing such freight is suitable to the road, to the extent of its surplus capacity after supplying the wants of the private corporation. *Held*, that the evidence did not show a sufficient public use to warrant the taking of the property under the power of eminent domain.

APPEAL from Supreme Court, General Term, Fourth Department.

Petition for the condemnation of land.

*Wm. G. Tracy*, for appellant.

*Thomas Hogan*, for respondent.

O'BRIEN, J.—The Split Rock Cable-Road Company, a corporation organized under chapter 462 of the Laws of 1888, entitled "An act to authorize the formation of elevated tramway corporations, and to regulate the same," applied by petition to the supreme court for authority to take for its corporate use certain lands of which the respondents are the owners. The right to take these lands was contested by the owners on several grounds,—among them, that the use for which they were required by the corporation was not public. The special term granted the application, and directed the appointment of commissioners to appraise the value of the property, and this order has been reversed by the general term. There are some questions of minor importance, such as the omission of the petitioner to file a map, and the present necessity for acquiring the lands for any purpose, that, in our view, need not be considered. The prominent question is whether the application is for the taking of private property for a public use in fact, or for a purpose merely private. The provisions of the statute under which the petitioner is incorporated, so far as they are material to the question, are as follows: "Section 1. Any number of persons not less than thirteen may form a company for the purpose of constructing, maintaining and operating an elevated tramway constructed of poles, piers, wires, rods, ropes, bars, or chains, for the transportation of freight in

Statement of  
case.

suspended buckets, cars, or other receptacles, for hire, and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the said tramway is to be constructed, maintained, and operated, and the length of said tramway, as near as may be." The particular powers which such corporations may possess and exercise are enumerated and specified in the following provisions: "Section 6. Every corporation formed under this act shall have power and authority (1) to cause such examination and surveys for its proposed tramway to be made as may be necessary to the selection of the most advantageous route, and for such purpose, by its officers and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto; (2) to lay out its tramway and to construct the same as hereby provided. Section 7. In case any company formed under this act is unable to agree for the purchase, use, or lease of any real estate required for the purposes of its incorporation it shall have the right to acquire title in fee to the same in the manner and by the proceedings provided by law for acquiring title to lands for railroad use by railroad corporations under the provisions of chapter 140 of the Laws of 1850, and the several acts amending the same, supplemental thereto, so far as the same are applicable. Section 9. Every corporation formed under this act shall have power and authority to erect and maintain all necessary and convenient buildings, stations, fixtures, and machinery for the accommodation and transaction of its business." The articles of association of the petitioner, which are acknowledged June 13, 1888, and filed June 19, 1888, state that the subscribers "have associated together as an elevated tramway corporation, to continue in existence for the period of fifty years, for the purpose of constructing, maintaining and operating an elevated tramway between Split Rock and Onondaga Lake, a distance of about four miles, both of which places are in Onondaga county." The capital stock of the petitioner was all paid in, and in June, 1889, it completed its tramway from Split Rock northerly to near the Erie canal, a distance of about three and a half miles, and since then it has been in operation. The tramway consists of two elevated cables held upon supports and parallel to each other, about 10 feet apart, on which run buckets by means of a trolley or pulley,—one line taking the buckets that have been filled, and the other line taking back the buckets which are empty. The location of the southern terminus of this tramway is upon the land of the petitioner, just north of the lands now de-

sired to be taken, and is in a gorge about 90 feet lower than the Hughes land.

There is nothing in the statute under which this corporation was formed, nor in the objects of the corporation as expressed in the articles of association, sufficient to warrant the conclusion that the business which it is organized to carry on is public in the sense that

Sufficient  
public use.

enables it to take private property under the power of eminent domain. The special term, however, found as matter of fact that the lands required by the corporation, and described in the petition, were for a public use; and it remains to inquire whether the general term was right in holding, as it did, that this finding was without evidence to support it. The facts and circumstances from which the nature of the use to which the corporation proposes to apply the property sought to be condemned are practically undisputed. The company has filed no map indicating an intention in any way to include the land in question within the boundaries of its property,—a fact which, standing alone, would form a very serious obstacle to the success of the application. *In re* Rochester Electric R. Co., 123 N. Y. 351, 46 Am. & Eng. R. Cas. 157. The map of its route originally filed, taken in connection with the evidence, shows that the southern terminus of the tramway is upon the land of the petitioner, and near the establishment of the Solvay Process Company, a corporation engaged in a large and growing business, consisting, as is to be inferred from the evidence, in the production of soda ash. This company owns 100 acres of land, upon which are stone quarries, and this land entirely surrounds the terminus of the tramway as well as the lands in question. The northern terminus of the tramway, as now built, is also on the lands of the Solvay Process Company, at the lime-kiln of their works, about 500 feet from the Erie canal. The incorporators of the petitioner were practically all stockholders and persons interested in the Solvay Company, and it is quite apparent that the petitioner was organized and is operated as an instrumentality to facilitate the business operations of the Solvay Company. The only business that it has thus far carried on was for that company. As now constructed, the limit of its carrying capacity cannot exceed 750 tons per day. It has thus far been operated practically night and day, and has succeeded in carrying for the Solvay Company 350 to 400 tons of stone a day. There is no public highway leading to the northern terminus of the road by means of which the public can obtain access for its use.

That the road has thus far been entirely for the benefit of the Solvay Company, and that its business is to be entirely

subordinate in the future to the plans and interests of the same company, is entirely clear. From the evidence of the president of the petitioner and other witnesses in support of the application, the most that is claimed is that the surplus of the capacity of the road, after supplying the wants of the Solvay Company, is to be devoted to public use in carrying, in buckets, freight offered to it by any person, providing such freight is suitable to the buckets and the road. Whether there is to be any surplus capacity, as the Solvay Company continues to expand its business, and, if so, how much, are questions which are left entirely uncertain. From the testimony it appears that the lands are required in order to increase the terminal facilities of the tramway company by building other tramways on the surface to facilitate the carrying of stone to the cable station, by erecting buildings for the storage of freight and for repair shops, and to furnish means of access. The company has other land that could be used for these purposes, but it is not so convenient. The evidence does not suggest any business that the petitioner is to carry on in the future, any more than in the past, beyond the carrying of stone for the Solvay Company, except possibly the carrying of coal. In regard to that, it is best to describe the project in the language of the president himself, who said: "We intend to make a contract with some private individual to furnish him with coal, so that he can transport it or sell it to people in that vicinity; to establish a coal yard, the same as anywhere,—not that the Solvay Process Company or the cable company will establish a coal yard. Some individual will have to run it, with whom we will make a contract to carry coal, and we propose to limit the contract to one individual for the present."

Looking at the statute under which the petitioner was incorporated, the objects of its incorporation, as described in the certificate, and the evidence in regard to the manner in which it has been and is to be operated, and the purposes of its corporate existence, we think it is entirely clear that the use to which the petitioner is to devote the lands of the respondents is not public, but private. The principles governing applications by corporations of this character to take private property for their corporate purposes have been very fully discussed and stated in a recent case in this court. *In re Niagara Falls, & W. R. Co.*, 108 N. Y. 375, 33 Am. & Eng. R. Cas. 99. Under the doctrine of this and other cases a possible limited use by a few—and not then as a right, but by way of permission or favor—is not sufficient to authorize the taking of private property against the will of the owner. *In re Deansville Cemetery Ass'n*, 66 N. Y. 569; *In re Eureka*

Basin W. & M. Co., 96 N. Y. 42; *In re* Rochester, H. & L. R. Co., 110 N. Y. 119; *In re* New York, L. & W. R. Co., 99 N. Y. 12, 23 Am. & Eng. R. Cas. 43.

The order appealed from is right, and should be affirmed, with costs.

All concur, except FINCH, J., absent.

**Eminent Domain—Public Use—Railroad for Private Advantage.**—See *Weidenfeld v. Sugar Run R. Co.* and note, *ante* pp. 505, 512; *Colorado E. R. Co. v. Union P. R. Co.* (C. C.), and note, 44 Am. & Eng. R. Cas. 25.

## KANSAS & ARKANSAS VALLEY R. CO.

*v.*

PAYNE *et al.*

(*U. S. Circuit Court of Appeals, Eighth Circuit Jan. 25, 1892, 49 Fed. Rep. 114.*)

**Use of Railroad Right of Way and Bridge—Foot Travel—Interference with Ferry Franchise.**—The complainants, under license granted them by the Cherokee nation, occupied a tract of land in the Indian territory fronting on the Arkansas river opposite the city of Fort Smith, and were engaged in operating a ferry at that point. The Kansas & A. V. R. Co. in 1888, under Act Cong. June 1st, 1886, which authorized it to build a railroad through the Indian territory, and to condemn lands to be used for railway, telegraph and telephone purposes only, condemned a right of way through said tract of land to the river. On March 15th, 1890, by act of Cong., the railway company was authorized to build a bridge across the Arkansas river to be used as a railway, passenger and wagon bridge. Said act recited that the building of the railway as authorized by the act of June 1st, 1886, involved the necessity of constructing the bridge. *Held*, that the railway company, by the act of March 15th, 1890, was impliedly authorized by congress to use its right of way as a roadway for ordinary travel, so far as might be found necessary to give vehicles and foot passengers access to the bridge, and that the grant of the right to build a bridge for the purposes of general travel did not infringe the ferry franchise, and that the complainants were not entitled to compensation for the loss of ferry patronage, since the building of the bridge had not cut off access to the ferry landing or rendered it any less feasible than before, to operate the ferry. *Held*, further, that a court of equity would not enjoin the railway company from permitting foot passengers and vehicles to travel over its right of way to such extent as might be necessary to reach the bridge, since the damages, if any, incident to such use might be recovered in an action at law, inasmuch as the railway company did not propose to intrude upon the possession of any lands occupied by complainants.

APPEAL from the Circuit Court of the United States for the Western District of Arkansas.

Action to restrain the use of right of way.

*H. S. Priest* and *Alex. G. Cochran*, for appellants.

*John H. Rogers*, for appellees.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge.—This is an appeal from an order granting and continuing a preliminary injunction, as authorized by the seventh section of the act of March 3, 1891, creating this court. The sole question for our consideration is whether the existing injunction was properly awarded, and that is to be determined on the case made by the bill and answer, and the affidavits and exhibits filed in the lower court on the hearing of the motion. The record before us shows that the appellant is a corporation created and existing under and by virtue of the laws of the state of Arkansas, and that by an act of congress approved June 1, 1886, (24 St. p. 73.) it was authorized to locate, construct, and operate a railway, telegraph, and telephone line through the Indian Territory, beginning on the eastern line of the territory, at or near the city of Ft. Smith, in the state of Arkansas; and running thence, in a north-westwardly direction, through the territory to a designated point on its northern boundary line. To that end the railway company was empowered to take and use a right of way 100 feet in width through the Indian Territory, but it was provided, in effect, that the land taken should not be leased or sold, and that it should *only* be used in such manner, and for such purpose as should be necessary for the construction and convenient operation of a *railroad, telegraph, and telephone line.* Statement of case.

The act contained provisions requiring compensation to be made to the Indian tribes and to individual occupants for all such lands as might be taken, and it also prescribed a mode of condemnation to be pursued in certain contingencies; but, without going into detail, it will suffice to say that before said railway could be constructed through any lands held by individual occupants, "according to the laws, customs, and usages of the Indian nations or tribes through which it might be constructed," the act required that full compensation should be made to such occupants "for all property taken or damage done by reason of the construction of such railway." Under the authority so conferred, and prior to the institution of this suit, the appellant had located and constructed its railroad for a long distance through the Cherokee Nation down to a point on the north bank of the Arkansas river opposite the city of Ft. Smith.

To reach the water at that point, it was compelled to condemn a right of way through a tract of land, fronting on the river, which was occupied and held by the appellees accord.

ing to the laws, customs, and usages of the Cherokee Nation. Such condemnation proceeding was duly prosecuted in the mode prescribed by the act of June 1, 1886, and resulted in a final decree on January 14, 1888, granting to the railway company a right of way through the appellees' lands to the water's edge. The damages awarded in such proceeding appear to have been duly paid shortly after the final decree. By another act of congress, approved March 15, 1890, (26 St. p. 21,) the appellant was authorized to bridge the Arkansas river at or near Ft. Smith. The first section of that act is as follows:

"Be it enacted \* \* \* that the Kansas & Arkansas Valley Railway, a corporation organized and existing under the laws of the state of Arkansas, and being empowered by act of congress approved June first, eighteen hundred and eighty-six, to construct its railway from a point on the eastern boundary line of the Indian Territory, at or near Ft. Smith, Arkansas, through said territory, in a northwest direction, to a point on the northern boundary line of said territory, with the power to build a branch as therein provided, the construction and operation of which said line of railway involves the necessity of constructing a bridge across the Arkansas river, in the Indian Territory, from a point at or near Ft. Smith, be, and the said Kansas & Arkansas Valley Railway, its successors and assigns, are hereby, authorized and empowered to construct said bridge across said river, and to maintain and operate the same as a railway, passenger, and wagon bridge."

After the approval of the act last referred to, the railway company proceeded to construct a bridge strictly in accordance with its provisions. It was so located that the northern end of the structure abutted on, and lay wholly within, the limits of the right of way previously condemned through the lands of these appellees. The bridge had been about completed, and the railway company was constructing an approach thereto at the northern end, suitable for the use of wagons and foot passengers, as well as for railway trains, when the work was arrested by the order of injunction from which this appeal was taken. The bill filed by the appellees to obtain an injunction alleged, among other things, that complainants occupied land fronting on the Arkansas river both above and below the northern terminus of the bridge; that a ferry privilege was "attached to said land;" that they had a license and the exclusive right from the Cherokee Nation to run a ferry across the river from that point to Ft. Smith, and had been engaged for years in running a ferry for the accommodation

of wagons, pedestrians, stock, and general travel, and had a large sum of money invested in said ferry; that the railway company had begun to construct "on its right of way," at the north end of the bridge, a wagon road and approaches for vehicles, foot passengers, and general travel, and had also begun to construct such approaches on the complainants' land outside of the limits of its right of way.

It was further averred that the construction of said roadway for footmen and general travel, on the railway company's right of way, constituted an additional burden on complainants' land which was unauthorized by law, and that the construction of said roadway for general travel over the appellant's right of way, and over the complainants' land, "would utterly destroy the value of the ferry privilege attached to said lands, and cause almost a total loss \* \* \* of the money invested in said ferry, ferry franchises, privileges, and other ferry property."

The foregoing statement discloses the material facts on which the appellees predicated their right to injunctive relief. The case is stated more at length in the opinion of the lower court. 46 Fed. Rep. 546. It is evident that the existing injunction cannot be sustained on the ground that the railway company had begun to construct approaches to its bridge suitable for foot passengers and vehicles, outside of the limits of its right of way, and on lands at the time occupied by the appellees. The injunction as awarded is clearly too broad to be sustained solely on that theory, for the reason that it in effect restrains the railway company from permitting wagons and foot passengers to have access to its bridge over any part of its right of way heretofore mentioned, which is the only method of gaining access to the bridge that seems to be possible. The right to an injunction, however, is not rested exclusively or mainly on the ground last suggested.

It is contended in behalf of the appellees, that the railway company has no authority to permit any part of its right of way to be traveled over by vehicles or foot passengers for the purpose of reaching the bridge, because that would be subjecting the right of way to a new use, without compensation; and, furthermore, that a court of equity, when appealed to, must of necessity award an injunction to prevent the imposition of such additional servitude. We are of the opinion, in view of all the circumstances of the case, that an unconditional order, such as was entered, restraining the appellant from constructing on its right of way a suitable roadway for footmen and vehicles, and restraining it as well from permitting the public to use the same, should not have been



granted, and cannot be upheld, even on the last mentioned theory. We entertain no doubt that the railway company has the right to construct an approach to the north end of its bridge, provided it keeps within the limits of its right of way, and that the appellees have no just cause to complain, even though the approach is made wide enough, and suitable for general travel, as well as for railway trains. The width and character of the approach is no concern of the appellees, if it is located wholly on land heretofore condemned and in the possession of the railway company. What they really desire to prevent by these proceedings is the use of the right of way by wagons and pedestrians when the approach to the bridge is completed; it is this right of use which evidently forms the subject of contention.

By the act of March 15, 1890, *supra*, congress, as we think, impliedly authorized the railway company to use its right of way as a roadway for ordinary travel, so far as might be found necessary to give vehicles and foot passengers access to its bridge. The railway company, therefore, has legislative sanction for permitting the new use of which the appellees complain. The act declares that the structure thereby authorized may be used as a "railroad, passenger, and wagon bridge;" and it recites in substance, that the grant of the right to construct a railroad through the Indian Territory, by the previous act of June 1, 1886, "involved the necessity of constructing a bridge across the Arkansas river, in the Indian Territory, \* \* \* at or near Fort Smith." From these provisions it must be inferred that congress intended that the north end of the bridge should abut against appellant's right of way where it intersected the Arkansas river, and form a mere prolongation of the right of way across the stream. Under these circumstances, we must presume that congress intended that the railroad right of way should be used by wagons and foot passengers to such extent as might be found necessary to enable them to reach the bridge, and that appellant should permit such use. To indulge in any other presumption would be to hold that congress has granted a right that cannot be enjoyed, as there is no mode by which general travel can reach the bridge, without passing to some extent over the railroad right of way.

Furthermore, the moving papers in the cause show that the railway company only proposes to use its right of way for general travel for a short distance back from the river, where the railroad crosses a public highway, and that the opening of the bridge for the use of foot passengers and vehicles, as well as for railroads, is a matter of such great public concern that the citizens of Ft. Smith have already do-

nated a considerable sum towards the erection of the structure. It must also be borne in mind that the alleged new use to which the appellant proposes to devote a portion of its right of way in no wise interferes with the possession of any lands now held and occupied by the appellees; neither does it alter any of the physical aspects of the place. The new servitude imposed on the right of way will not render it any less feasible than before to operate a ferry across the river, as it is not alleged, or even suggested, that any proposed changes made along the right of way to adapt it to general travel will obstruct access to the ferry landing, either on the land or water side, or impair any other riparian right.

In short, the appellees, in their bill, have not alleged any loss or inconvenience as liable to ensue from the new use, except that the opening of the bridge for the accommodation of general travel will lessen the patronage of the ferry; and this is evidently a species of damage against which neither a court of law or equity can afford the appellees any protection. It is a damage not due to the fact that by destroying some riparian right of the appellees, or by obstructing the approaches to the ferry landing, the railway company has rendered it less feasible to operate a ferry; but it is a damage that is wholly due to the fact that a new means of crossing the river has been authorized by congress, which enters into competition with the ferry, and renders the business less profitable.

It is hardly necessary to add that congress was not bound to provide compensation for a consequential injury of that character, when it authorized the construction of a bridge, as the ferry franchise was not infringed or taken, within the meaning of the constitution, by building the bridge. And the same proposition would hold good if the appellees had had a special franchise to operate a ferry for a term of years, instead of a ferry license from the Cherokee Nation, renewable annually, which is all that the present record discloses. *Parrott v. City of Lawrence*, 2 Dill. (U. S.) 332; *Bush v. Peru Bridge Co.*, 3 Ind. 21; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420.

In view of the considerations to which we have adverted, we are satisfied that the complainants below were not, as a matter of right, entitled to injunctive relief, and that the existing injunction should not have been granted, even though we concede, for the purposes of the present decision, that the additional use to which the railway company proposed to devote its right of way was of such character as entitles the complainants to some additional compensation.

It was undoubtedly a matter of much public concern to the citizens of Ft. Smith and the Indian Territory that vehicles and foot passengers should be allowed to use the bridge as soon as possible, and that necessitated the use to a limited extent of appellant's right of way. When congress authorized the latter use (as we think it did) it was not incumbent on it to require compensation for the additional servitude to be paid in advance of its actual enjoyment by the public, even if some additional compensation is recoverable. *Cherokee Nation v. Southern Kan. R. Co.*, 135 U. S. 641-659, 44 Am. & Eng. R. Cas. 26. Furthermore, the appellees have a right of action at law to recover such additional compensation as they may be entitled to. *Central Branch U. P. R. Co. v. Twine*, 23 Kan. 591; *Bentonville R. Co. v. Baker*, 45 Ark. 252; *Lewis Em. Dom.* § 623, and citations. But the most important consideration bearing on the right to an injunction is the fact that, in the exercise of the authority granted to it by congress, the railway company does not propose to intrude upon the possession of any lands now occupied by the appellees, or to do an act that will occasion injury to any considerable extent.

The damages, if any, to which the appellees can lawfully lay claim, are certainly very small, if not purely nominal. We recognize the rule that legal rights of every description are entitled to protection, no matter how small their money value may be, but a court of equity is not bound to afford protection by an unconditional order of injunction, when adequate relief may be afforded in some other manner, whether the right involved is of great or little value. *Bassett v. Salisbury Manuf'g Co.*, 47 N. H. 437; *McElroy v. Kansas City*, 21 Fed. Rep. 257, 6 Am. & Eng. Corp. Cas. 8; *Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq. 291, 292.

We are of the opinion that the circuit court would have gone quite far enough in the case at bar, had it required the appellant to give a bond in a reasonable sum, not exceeding \$2,500, conditioned to pay such damages, if any, as the complainants below might thereafter be adjudged to be entitled to, by any court of competent jurisdiction, in consequence of the alleged additional servitude imposed or threatened to be imposed on its right of way.

Entertaining these views, the order of injunction appealed from is hereby vacated and annulled, the existing injunction is dissolved, and the cause is remanded to the lower court with directions to take a bond for the protection of the appellees not exceeding the amount, and with conditions as above indicated.

## COMMISSIONERS OF PARKS AND BOULEVARDS

v.

DETROIT, GRAND HAVEN & MILWAUKEE R. CO. *et al.**(Michigan Supreme Court, July 28th, 1892.)*

**Eminent Domain—Condemnation of Crossing Over Railroad "Yard" for Boulevard.**—Under Local Acts 1889, No. 388, sec. 15, which provides that the commissioners of parks and boulevards may acquire by legal proceeding, "any land or interest in lands which may be found necessary for the opening of any park or enlargement or extension of any park or boulevard which may hereafter be laid out, located or established, "a right of way for a boulevard may be condemned across the right of way of railroad companies, completely occupied with their main tracks, and side tracks used for the purpose of storing cars, and called a "yard."

**Damages—Cost of Erecting Gates at Crossing.**—A railroad company is entitled to compensation for expense incurred in the erection of safety gates at a crossing of a boulevard extension over its tracks.

APPEAL from Recorder's Court of Detroit.

Proceedings to condemn a right of way for the use of a boulevard across railroad tracks.

*E. W. Meddaugh, Henry Russel, and L. C. Stanley, for appellants.*

*John J. Speed, for appellees.*

MCGRATH, J.—These are proceedings for the opening of the boulevard in the city of Detroit, over respondent's rights of way, under Act. No. 388 of the Local Acts of 1889. Precisely the same questions are raised as <sup>Statement of case.</sup> were passed upon in Commissioners, etc., *v. Michigan Cent. R. Co.*, 90 Mich. 385, 50 Am. & Eng. R. Cas. 144; and in *Same v. Chicago, D. & C. G. T. J. R. Co.*, (Mich.) 51 N. W. Rep. 447, except that here it is insisted that the opening is across lands which are used by the railroad company for yard purposes. It clearly appears from the records that all of the tracks in use by respondents within the lines of the proposed boulevard, and for some distance both north and south, are within the original rights of way of respondents. The only basis for the claim that the land sought to be condemned is railroad yard land is the testimony, upon cross-examination, of the city engineer, who says that it is a railroad yard. The yard master called by respondents said: "We call the Grand Trunk Railway Y tracks the 'Yard.'" This Y, so called, is the main line upon which every train to and from the city runs. The main track of the Detroit,

Grand Haven & Milwaukee road is upon the right of way which it is proposed to cross. In the motions made to dismiss the petitions in both cases respondents allege, upon oath, that the lands sought to be taken "are portions of the rights of way of said respondents, occupied by its main and side tracks." The yard master says, further: "Trombly and Milwaukee avenues cross the track. These avenues interfere with switching, the same as any grade crossing, and they take the storage room for cars." It cannot be contended that a railroad company can so convert its right of way into store room for its cars, and call it "a yard," and thus prevent a street from crossing its right of way. It cannot be that a railroad company can condemn a right of way through city or other property, and then so convert such right of way, or so denominate it, as to prevent the owners of the property through which that right of way is condemned from obtaining streets across the same.

No such use or purpose was contemplated when the right of way was secured. It is notorious that every street, from Tenth to the westerly limits of the city, is crossed by the Michigan Central, and upon every one of these crossings side tracks have been added, until every foot of space upon the right of way of the company is covered. The Lake Shore & Michigan Southern Railway, the Grand Trunk Railway, and the Detroit & Bay City Railway maintain separate tracks and side tracks, with adjoining rights of way, from and across the boulevard on the west, northeasterly to the northerly limits of the city at a point above the land in question, crossing Michigan avenue, Grand River avenue, Woodward avenue, and again crossing the boulevard and more than a score of other streets. The Detroit, Grand Haven & Milwaukee maintains a main track and two or more side tracks from Croghan street north to the city limits, covering 50 streets in its course.

Is it true that a railway company may fill its right of way on a street with side tracks, and that the existence of these side tracks at other points, if called "a yard," will actually prevent the opening of streets across the right of way of the company? In *Milwaukee & St. P. R. Co. v. City of Fari-bault*, 23 Minn. 167, and in *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn. 359, it was proposed to take depot grounds. In *Prospect Park & C. I. R. Co. v. Williamson*, 91 N. Y. 552, 14 Am. & Eng. R. Cas. 34, the land proposed to be taken had been condemned for depot purposes.

In *Re City of Buffalo*, 68 N. Y. 167, it was proposed to take certain portions of the yards of the railway company for canal purposes.

*In Re Boston & A. R. Co.*, 53 N. Y. 574, the railroad company sought to take lands which had been donated to the respondent village for the purpose of a park.

Here neither depot nor yard grounds are proposed to be taken, nor is it proposed to divest the railroad companies of the legitimate use of the land for the purpose for which it was condemned. The case of *Commissioners, etc., v. Michigan Cent. R. Co.*, (lessee of the Detroit & B. C. Ry.,) *Lake Shore & M. S. R.*, and *Grand Trunk*, 90 Mich. 385, 50 Am. & Eng. R. Cas. 144, involved the crossing of the rights of way of these three roads at a point where the rights of way are side by side, where the main and side tracks of each road cross the boulevard, and where the Detroit & Bay City road leaves the line of the other roads, forming a Y, to reach the main tracks of the Michigan Central Railroad.

The same questions were raised in that case, except that the Y was not called a part of the yard. All of the traffic of the Detroit & Bay City road, and all of the freight traffic of the Grand Trunk, to and from the western portion of the city, crosses the boulevard at that point. The verdict and order of confirmation must, however, be set aside for the refusal of the court to permit the jury to consider the allowance to respondents of compensation for the expense of erecting safety gates.

Upon that point, as well as the other questions raised, the case is governed by *Commissioners, etc., v. Mich. Cent. R. Co.*, and *Same v. Chicago, D. & C. G. T. J. R. Co.*, *supra*. The causes will be remanded to the jury for further proceedings.

MORSE, C. J., and LONG and MONTGOMERY, JJ., concurred with McGRATH, J.

GRANT, J., (*dissenting*).—I can find no reason to justify a reversal or modification of the former opinion in this case, which was handed down May 6th, but withheld when the rehearing was ordered, and now becomes my dissenting opinion. It was stated upon the rehearing that the respondent obtained the land by purchase. If this be so it clearly has the right to occupy this land for any purpose legitimately connected with railroading. But if it was obtained by condemnation proceedings, why may it not use a reasonable portion of the land thus obtained for yard purposes? All the switching of the Detroit, Grand Haven & Milwaukee Railway Company in connecting with other railroads in the city of Detroit, and in connection with the neighboring factories, is done here. Petitioner's only witness, its own en-

gineer, testified: "It is a railroad yard, with switches and main tracks." The crossing of the boulevard will destroy the yard, and work irreparable injury to the respondent, without any corresponding benefit to the public, who will use the boulevard simply for pleasure. The injustice in establishing a crossing at grade at this point is apparent. It is not to be presumed that the legislature intended to accomplish an injustice. Neither of the boulevard acts showed the crossing at this place, and we cannot, therefore, presume knowledge of the situation on the part of the legislature, and that it would have authorized a grade crossing so injurious to respondent and so dangerous to the public.

**Laying out Streets and Highways Across Railroad Tracks.**—See *Commissioners of Parks v. Michigan Cent. R. Co.* (Mich.) 50 Am. & Eng. R. Cas. 144; *Chicago & N. W. R. Co. v. City of Chicago* (Ill.) 50 *Id.* 150, and cases cited in note, 160. See also *Illinois Cent. R. Co. v. City of Chicago*, *post*.

**Damage to Adjacent Property by Construction of Boulevard Across Railroad Tracks.**—Where, in a proceeding to condemn a right of way for a boulevard across defendant's railroad tracks, it appeared that the crossing rendered the company's warehouse, and the land upon which it was located, less available and less valuable, this was a proper element of damages, and should have been submitted to the jury. *Commissioners of Parks & Boulevards of Detroit v. Detroit & C. G. T. Junction R. Co.*, (Mich. April 8, 1892), 51 N. W. Rep. 934.

## ILLINOIS CENTRAL R. CO.

v.

## CITY OF CHICAGO.

(*Illinois Supreme Court, May 12, 1892.*)

**Eminent Domain—Extension of Street Across Railroad.**—Under the constitution (Const. 1870, Art. 11, § 14) and statutes (Rev. St. 1874, chap. 24, Art. 5 § 1 par. 89) of Illinois, every railroad company holds its right of way subject to the right of the public to extend the public highways and streets across such right of way, and a city may exercise this right even though such extension subjects the railroad company to great inconvenience in the operation of its road. And this right includes the extension of a street across a collection of tracks called a "yard."

**Overhead or Grade Crossings—Discretion of City Council.**—Under the statute (Rev. St. 1874, chap. 24, Art. 5, § 1 par. 89) the city council is vested with the power to extend the streets either "over" or "across" the tracks, either above the tracks by means of viaducts, or on the same grade or level with the tracks, and having exercised their discretion, the courts will not interfere.

**Restoration of Track.**—The provision in par. 89 of the above statute, that "where no compensation is made to said railroad company the city shall restore such track to its former state, or in a sufficient manner not to have impaired its usefulness," only requires the track to be so restored as not to

impair its usefulness more than is rendered necessary by the existence of the street.

APPEAL from Cook Circuit Court.

Bills to enjoin the city of Chicago from extending certain streets across complainant's right of way. Upon hearing the bill was dismissed. Complainant appeals.

*C. V. Gwin* (*James Fentress*, of counsel,) for appellant.

*John S. Miller* and *Arthur H. Chetlain*, for appellee.

MAGRUDER, C. J.—These are three bills in chancery, filed by the appellant company against the appellee in the circuit court of Cook county; and, as the cases involve the same questions, and have been submitted upon the same abstracts and briefs, they have been taken and considered as one cause. Case stated. The object of the bills is to enjoin the city of Chicago from extending certain streets across the right of way of the Illinois Central Railroad Company. The first bill alleges that on September 22, 1890, the city passed an ordinance for opening Fifty-Sixth street across such right of way, and thereafter filed its petition in the said circuit court for the condemnation of the land necessary for such improvement; that on September 15, 1890, the city passed an ordinance for the opening of Seventy-Ninth street across said right of way, and thereafter filed its petition to condemn in the same court; that on January 19, 1891, the city passed an ordinance for opening Sixtieth street across said right of way, but no proceeding for condemnation in pursuance of this ordinance appears to have been begun at the time of the filing of the bill, on February 28, 1891. The second bill, filed on June 15, 1891, alleges that on March 16, 1891, the city passed an ordinance for opening Seventy-Second street across said right of way, and thereafter filed its petition for condemnation in said court. The third bill, filed on July 24, 1891, alleges that on March 30, 1891, the city passed an ordinance for opening Eighty-Second street between Dobson avenue and Stony Island avenue by condemning therefor that part of appellant's right of way lying between the north and south lines of said street, both produced eastwardly across said railroad, and thereafter filed its petition for condemnation in the superior court of said county; that on June 2, 1891, the city passed an ordinance for opening and widening Ninetieth street from Manistee avenue to the west line of appellant's right of way by condemning therefor certain specified parts of appellant's right of way; that the land over which it is so proposed to extend Eighty-Second and Ninetieth streets is "railroad yard" land; that eight tracks have been laid in that part of the "yard" where Ninetieth street will cross,

51 A. & E. R. Cas.—34



and two tracks are in course of construction in that part where Eighty-Second street will cross; that the city thereafter filed its petition in said superior court to condemn the land necessary for so opening and widening Ninetieth street. The bills pray for injunctions against the opening or extension of these streets across the railroad tracks or right of way at grade, or otherwise than by viaducts over or subways under such right of way or tracks. The bills charge, and the answers of the city thereto deny, that the extension of streets, as ordered in said ordinances, will be an irreparable injury to the railroad company, and will obstruct the use of its tracks as now located, and materially and unnecessarily impair its franchises. Both sides introduced testimony, and, after hearing had, the court below dissolved the injunctions, and dismissed the bills. From such decrees of dismissal the present appeals are prosecuted.

The material questions here involved have been settled by recent decisions made by this court in the cases of *Illinois C.*

*R. Co. v. Chicago* (Ill.) 28 N. E. Rep. 740, and *Chicago & N. W. R. Co. v. Chicago*, (Ill.) 50 Am. & Eng. R. Cas. 150. In view, however, of the great ability and ingenuity with which counsel have again pressed these questions upon our attention we will restate our views. The appellant company, like every other railroad company, holds its right of way subject to the right of the public to extend the public highways and streets across such right of way. *Chicago & N. W. Ry. Co. v. City of Chicago*, *supra*. The constitution of the state provides that "the exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking by the general assembly of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity, the same as of individuals." Const. 1870, art. 11, § 14. By the act of 1872, to provide for the incorporation of cities and villages, the general assembly conferred upon the city council in cities the power "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same." Rev. St. 1874, chap. 24, art. 5, § 1, par. 7. If the legislature had granted to cities no other power in regard to the extension of streets across existing railroads than the general power conferred by paragraph 7, here quoted, it might be necessary to consider and discuss a number of authorities to which counsel for appellant have referred in their briefs. These authorities hold that the land included in the right of way of an existing railroad is already devoted to a public use by ex-

Right of railroad subject to right of public.

press legislative grant; that the extension of a street across it is such an appropriation of it to another public use as is not authorized by a general power to open or extend streets; that in such case the authority must be created, or the legislative intent must be made to appear, by express words, or by necessary implication.

But the general assembly has conferred upon the cities in this state the power to extend streets over railroad rights of way by express legislative authority. That authority is given by paragraph 89, § 1, art. 5, of said act of April 10, 1872, in the following words: "The city council shall have power by condemnation or otherwise to extend any street, alley or highway over or across, or to construct any sewer under or through, any railroad track, right of way, or land of any railroad company, (within the corporate limits;) but where no compensation is made to such railroad company the city shall restore such railroad track, right of way, or land to its former state, or in a sufficient manner not to have impaired its usefulness."

Power to  
cross track at  
grade or  
otherwise.

Counsel say that the judgments to be rendered in the condemnation proceedings will take the land itself, or the exclusive use thereof. Such cannot be the effect of the judgments. We held in *Illinois Cent. R. Co. v. City of Chicago*, *supra*, that the track to be condemned under the provisions of paragraph 89, "for the extension of the street over and across railroads, railroad rights of way and lands," was intended by the legislature to be "subject to the joint use by the railroad in the exercise of its franchise and by the public as a street." The use by the public is, as matter of fact, subject and subordinate to the use by the railroad company. The trains of the railroad company have a prior right to passage over the crossing. The public, at whatever inconvenience it may be to the interests or the business of the individual citizen, is compelled to wait until the cars of the company have passed. The ordinances, in providing for an extension of the street across the right of way, and for the condemnation of railroad property for the purposes of a street, provide only for the acquirement of an easement by the public over the railroad land, and not for any ownership in the fee thereof. The petitions in the condemnation proceedings ask only that land may be condemned for the improvements specified in the ordinances, and the improvements so specified are never easements to be acquired for the purpose of crossing or passing over the tracks or rights of way. No judgments have yet been entered in the condemnation proceedings sought to

Easement  
over railroad  
land.

be enjoined, but such judgments, when entered, in whatever language they may be couched, can only clothe the city with an easement or right to pass over the tracks. They cannot vest the city with the fee of the land, or with the exclusive use thereof, because the statute enters into and forms a part of the judgment, and limits and qualifies the nature of the condemnation therein ordered. As paragraph 89 authorizes nothing more than an easement to be acquired by the condemnation proceeding, it follows that the judgment therein "would necessarily only have vested the city with the right of use and occupancy of the land condemned, subject to the rightful use of the railroad company thereof. Neither will have the right of occupancy to the exclusion of the other, but each subordinate to the right of the other for the separate use contemplated; the one occupying and in control thereof for all the legitimate purposes of a public street, and the other for the reasonable and proper exercise of its franchise." While, however, the statute itself will limit the condemnation judgment in the manner here indicated as to the extent of the right conferred by it, yet the court rendering such judgment has the power to specifically state therein the nature of the interest thereby vested in the city. *Illinois Cent. R. Co. v. City of Chicago, supra*. We have also held in the latter case that equity will not interpose to enjoin a condemnation proceeding, at any rate for such reasons as are set up in the present bills. Whatever just claims the railroad may have to compensation can be set up in that proceeding. "We are not aware of any authority that authorizes or gives jurisdiction to courts of equity to proceed by injunction unless there is an excess or abuse of the power conferred by law, or there is an attempt to take and appropriate the property without authority of law, or in a manner and to an extent not authorized by law." *Illinois Cent. R. Co. v. City of Chicago, supra*. There is no such abuse or unlawful attempt shown by the records in these cases.

The allegations contained in these bills amount, in substance, to complaints that the passage of trains over the proposed crossings will be so frequent, and the amount of public travel upon the streets will be so great, as to subject the appellant company to great inconvenience and hindrance in the operation of its road. Allegations of a similar character were made in the bill in the *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506, 2 Am. & Eng. R. Cas. 440, where the complaining companies filed a bill against the defendant company to enjoin the latter from prosecuting a condemnation proceeding instituted for the

Hindrance in  
operating  
road not  
ground for  
relief.

purpose of acquiring an easement or crossing over the tracks of the former. In the bill in that case it was stated that complainants' business was constantly increasing; that more than 3,500 cars, and about 400 engines, passed daily over the premises in question; that complainants intended to construct other tracks; that they could not properly transact their business or do their duty to the public without the use of the whole of said premises; that any interference therewith would cause great and irreparable injury to them and to the interests of the public committed to their charge as carriers; that, if defendants' road should be constructed and operated as proposed, the business would be almost doubled; that such increase would so hinder and embarrass complainants in transferring freight and running trains as to cause an injury, constantly increasing, and not susceptible of compensation by damages in a case at law, and would impair and infringe and destroy the franchises of complainants, and that the construction and operation of defendants' road as proposed would necessarily be a nuisance of a serious and irreparable nature in the delay of business and increased danger to life. The bill was answered, and, after hearing had, was dismissed for want of equity. We affirmed the decree of the court below, and held that a court of chancery could not relieve against the injuries complained of. The charges made in the present bills are no stronger than those made in the Chicago & W. I. R. Co. case.

It is claimed that paragraph 89 gives to the city council the option of extending the street either above the railroad tracks by means of a viaduct, or across it at grade, and that a court of chancery will require the council to adopt the former, rather than the latter, <sup>Interpretation of</sup> "across" <sup>and "over."</sup> method of crossing, because less inconvenience will thereby be caused to the appellant in the operation of its road. It is admitted by counsel for appellant that the legislature intended by the use of the word "across" to provide for a crossing at grade; but it is insisted that the word "over" was intended to designate a crossing above the right of way, track, or land by means of a viaduct. The two words "over" and "across" may be used interchangeably, and as having the same meaning. Webster thus defines the word "across:" "From side to side; athwart; crosswise, quite over." He defines the word "over" as follows: "Above, or higher than, in place or position, with the idea of covering; across, from side to side of; upon the surface of." The word "over" has been held to denote a crossing upon the surface in *Newburyport Turnpike Corp. v. Eastern R. Co.*, 23 Pick. (Mass.) 326, where the supreme court of

Massachusetts said: "Words 'over' and 'under,' as applied to the surface, are not precisely opposites. One passes over a road if he crosses it on the surface, as well as when he crosses above it on a bridge." *Boston & M. R. Co. v. Mayor, etc., of Lawrence*, 2 Allen, (Mass.) 107. But the word "over" has also been construed to denote a crossing at a higher level, and not on the same level; and it has been held to mean "not 'upon,' but 'above,' so the railroad should pass under the highway." *Central Vt. R. Co. v. Royalton*, 58 Vt. 234; *Boston & M. R. Co. v. Mayor, etc., of Lawrence*, *supra*. While, therefore, the word "over," as used in paragraph 89, may be construed as contemplating a crossing of the street at the same level or grade with the railroad track, we are inclined to think that its meaning is broad enough to also confer the power of extending the street above and over the track or right of way by means of a viaduct or bridge. But the word "across" was evidently intended to designate a crossing at grade, or on the same level as the railroad right of way. Consequently the city council is vested by paragraph 89 with the power to extend the streets either "over" or "across" the tracks, either above the tracks by means of viaducts, or on the same grade or level with the tracks. The council is thus clothed by the legislature not only with the power of acquiring an easement by condemnation or otherwise over the railroad tracks or right of way, but also with the discretionary power of deciding as to the mode of crossing,—whether above, by viaduct, or at grade, and upon the same level.

In the present cases the ordinances do not provide for crossings by means of viaducts, but for crossings at grade. The municipal authorities have exercised the option or discretionary power conferred upon them by the legislature, and provided for crossings in one only of the methods indicated in the statute, and have instituted condemnation proceedings in pursuance of the ordinances so passed by them. Their action in this regard is political or legislative in its character, and cannot be controlled by the courts.

Appellant in these cases is asking a court of chancery to substitute its judgment for the judgment of the city council upon a question which belongs exclusively to the legislative branch of the government. They are asking a court of chancery to require the city council to repeal its ordinances for grade crossings, and, in the place thereof, to adopt ordinances for viaduct crossings. Such relief as this cannot be granted under the facts disclosed in these records. While it may be true that inconveniences and interruptions, both to

Discretionary  
power of  
council.

appellant and to the public, may result from street crossings made necessary by the unparalleled growth of the population in the city of Chicago, yet the proof does not disclose that the ordinances in these cases are unreasonable in their terms or in the methods provided therein for the extension of the streets. In *Curry v. Mt. Sterling*, 15 Ill. 320, we said: "This power of the corporation to extend and open streets applies to all lands within its boundaries, whether the same be laid out into town lots or not. The extension of the street in question was a matter of discretion on the part of the board of trustees (of the town.) The courts cannot review the exercise of that discretion." In *Chicago R. I. & P. R. Co. v. Town of Lake*, 71 Ill. 333, we said: "The taking and appropriating property for a public street or highway by a municipality is a public use in its nature, and cannot be questioned or denied. \* \* \* When the use is public, the judiciary cannot inquire into the necessity or propriety of exercising the right of eminent domain. That right is political in its nature, and not judicial. It belongs exclusively to the legislative branch of the government, and under our constitution the judiciary have nothing to do with it." Courts will not interfere with legislative power. The *Curry* case and the *Town of Lake* case were reindorsed and approved in *Dunham v. Hyde Park*, 75 Ill. 371. In *Brush v. City of Carbondale*, 78 Ill. 74, it was said: "If the city is incorporated, then the council probably have power to open, grade, and repair the streets, and may, for aught we know, have ample discretionary power to do so, as to time, manner, and cost; and, if acting under the general incorporation law, \* \* \* the power is general, and confers a large discretion in its exercise; and that power will not be controlled by the courts unless there is abuse, operating oppressively upon individuals. \* \* \* Where persons or officers are acting within well-recognized powers, or exercising a discretionary power, a court of equity will be wholly unwarranted in interfering unless the power or discretion was being manifestly abused to the oppression of the citizen." In *Sheridan v. Colvin*, 78 Ill. 237, we said: "The second question is, what is the nature of the power sought to be exercised in passing the ordinance under consideration? To that question there can be but one answer, and we shall not stop to discuss it. The power is legislative and discretionary. The third and last question is, had the court of chancery jurisdiction to interfere with the exercise of that power? We are clearly of the opinion that it had not. The subject is purely political." In *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, *supra*, we said: "The question whether

it is wise to permit such railroad company to select its own route, and choose the point and manner of crossing other railroads, was also a political question for the general assembly to determine, and that determination cannot be reviewed by the courts."

To the same effect are the text-books and the decisions in other states. Dillon, in his work on Municipal Corporations (4th Ed., vol. 1, § 95), says: "Where, by its charter, a municipal corporation is empowered, if it deems the public welfare or convenience requires it, to open streets or make public improvements thereon, its determination, whether wise or unwise, cannot be judicially revised or corrected." In Lewis on Eminent Domain it is said (section 238): "Whether the power of eminent domain shall be put in motion for any particular purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the legislature. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance." Mississippi & R. R. Boom Co. *v.* Patterson, 98 U. S. 403; Chicago & E. I. R. Co. *v.* Wiltse, 116 Ill. 449, 24 Am. & Eng. R. Cas. 261; People *v.* New York Cent. & H. R. R. Co., 74 N. Y. 302; Milwaukee & St. P. R. Co. *v.* City of Faribault, 23 Minn. 167; National D. R. Co. *v.* Central R. Co., 32 N. J. Eq. 755; National D. & N. J. J. C. R. Co. *v.* State, 53 N. J. L. 217, 47 Am. & Eng. R. Cas. 87; Struthers *v.* Dunkirk, W. & P. R. Co., 87 Pa. St. 282; Central R. Co. *v.* State, 32 N. J. Law, 220; 2 Wood, Ry. Law, p. 981; Elliott, Roads & S. p. 598; Illinois Cent. R. Co. *v.* Bentley, 64 Ill. 438; People *v.* Chicago & A. R. Co., 67 Ill. 118; Little Miami C. & X. R. Co. *v.* City of Dayton, 23 Ohio St. 510; Johnston *v.* Providence & S. R. Co., 10 R. I. 365; People *v.* Boston & A. R. Co., 70 N. Y. 569.

We concur in the following views expressed by the supreme court of the state of Ohio in Railroad Co. *v.* City of Dayton, *supra*: "The mere fact that the extension of the street, as proposed, will inconvenience the plaintiffs or subject them to additional expense in transacting their business and operating their road, constitutes no ground for the interference of a court of equity. The same results, to a greater or less extent, are produced wherever a railroad is crossed by a public street or highway. These are matters which it is clearly the duty of the city council to take into consideration in determining the necessity and expediency of the proposed improvement; but, so long as their proceedings are regular, and they act from proper motives and within the limits of their authority, the discretion confided to them in respect to

the location and establishment of streets is not subject to judicial revision."

We have recently held in *Drexel v. Town of Lake*, 127 Ill. 54, that it was a question to be determined by the trustees of a town which one of two modes of carrying off the sewage of a district should be adopted as the best and most expedient mode, and we there said: "The choice of expedients is within the legislative discretion of the trustees of the town—a discretion with which the courts will not interfere unless clearly abused."

Paragraph 89 was adopted by the legislature in 1872. Afterwards, in 1874, the legislature passed an act requiring the railroad companies in this state to construct and maintain railroad crossings of highways and streets. *Chicago & N. W. Ry. Co. v. City of Chicago*, *supra*. Considering paragraph 89 without reference to the subsequent act of 1874, we cannot see that the application of the second clause of the paragraph to the facts of this case furnishes any justification for a resort to a court of equity. Such second clause provides that "where no compensation is made to said railroad company, the city shall restore such railroad track, right of way, or land to its former state, or in a sufficient manner not to have impaired its usefulness." Without deciding the question whether any obligation does or not rest upon the city under the present proceedings to restore the crossing in a sufficient manner not to impair the usefulness of the tracks, such obligation, if it existed, would not be violated because the city chooses to extend the streets at grade, rather than by means of a viaduct. The language of the second clause is not to be taken literally. It is well understood that the track or right of way cannot, in the nature of things, be restored to the same state of usefulness with the street thereon as before. It is to be restored so as not to impair its usefulness more than is necessary in view of its use for the purposes of a street subject to the use by the railroad company. It is not to be rendered less useful, except in so far as diminished safety and convenience are inseparable from its use by the public as a street crossing. It is not expected that the crossing can be so restored as to obviate all danger or delay or inconvenience. It is only necessary that there should be no unreasonable impairment of the usefulness of the railroad right of way. To this effect is the weight of authority. 2 Wood, Ry. Law, § 271, p. 975, note 2, and cases; *Com. v. Erie, & N. E. R. Co.*, 27 Pa. St. 339; *People v. Dutchess & C. R. Co.*, 58 N. Y. 152; *Johnston v. Providence & S. R. Co.*, 10 R. I. 365; *Chicago R. I. & P. R. Co., v. Moffitt*, 75 Ill. 524;

Restoration of  
tracks.



City of Bridgeport v. New York & N. H. R. Co., 36 Conn. 255; 2 Wood, Ry. Law, § 271, p. 981, note 1; People v. Boston & A. R. Co., 70 N. Y. 569; State v. St. Paul, M. & M. R. Co., 35 Minn. 131.

So far as the extension of the streets across Eighty-second and Ninetieth streets is concerned, the language of paragraph 89 is broad enough to authorize the extension across the railroad "yard," as well as across the tracks or right of way. The proof shows not only that Eighty-second street is one mile from Ninetieth street, but that what is called a "yard" is nothing more than a collection of tracks; and hence the opening of the streets across the land embraced in the yard is authorized by paragraph 89, under the rule laid down in Delaware & H. C. Co. v. Village of Whitehall, 90 N. Y. 21, 10 Am. & Eng. R. Cas. 227.

The decree of the circuit court dissolving the injunction and dismissing the bills is affirmed.

**Eminent Domain—Extension of Streets Across Railroad Tracks.**—See Commissioners of Parks and Boulevards v. Detroit, G. H. & M. R. Co., and note, *ante* pp. 525, 528.

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## GEORGIA MIDLAND & GULF R. CO.

v.

## COLUMBUS SOUTHERN R. CO.

(*Georgia Supreme Court, April 28, 1892.*)

**Eminent Domain—One Railroad Crossing Track of Another in a City Street.**—Without first making compensation for the damages which will result therefrom, one railway company cannot lay and use its track across the track of another railway company, located in a public street in a city.

**ERROR from Muscogee County Superior Court.**

Suit by the Georgia, Midland & Gulf Railroad Company against the Columbus Southern Railroad Company to enjoin it from constructing a track across plaintiff's tracks.

The following is the substance of the official report :

The exception in this case is to the refusal of the injunction sought by the Georgia Midland & Gulf Railroad Company. The petition therefor alleged: The city of Columbus is petitioner's principal terminus; and, by virtue of certain grants of land made petitioner, it constructed all of its side tracks, freight depots, shops, etc., there, expending large sums of money in so doing. The main track of its road connects with said terminals, which are located upon blocks 51, 52, 45, and

46, and part of blocks 54, 53, 42, and 43, on the east commons of Columbus; blocks 42 and 43 being bounded by Eighth street. The main track extends northward from said terminals, and out of block 42 across Eighth street, and thence across block 40 of the commons. After petitioner had constructed its terminals and main track the Columbus Southern Railway Company was chartered, and constructed from Columbus to Albany; its main track terminating at a point east of that of petitioner, and on the east commons. Thereafter, grants of land were made to the Columbus Southern, all of which are located east of the main track and lands of petitioner; and upon the grants so made the Columbus Southern constructed its terminals, and connected its railway therewith, and has long since constructed its railroad and laid out its depot grounds in Columbus, and connected its main track therewith. The depot grounds and terminals of the Columbus Southern are connected with the city, and can be easily approached by the public in the city, and by persons traveling upon or doing business with that railway company, by several broad streets and avenues, all constantly open both for travelers and freight. A corporation known as the Columbus Railroad Company, about January 20, 1888, under grant of right of way from the city, constructed a track west of petitioner's track, and extended it west through Sixth street, and northward across Eighth. This track is used by the Columbus Railroad Company for transfer of freight, and delivery of the same to the merchants in Columbus. The Columbus Southern, for the purpose of delivering its freight cars to the Columbus Railroad Company, is about to construct a side track from its main track, diagonally across petitioner's main track and along Eighth street, to connect with the track of the Columbus Railroad Company, and has petitioned the mayor and the council of Columbus for permission to lay such side track. On an *ex parte* showing, this request was granted, and the Columbus Southern is now proceeding to lay such side track. Its action is an infringement upon petitioner's rights, is without authority of law, and the track is being laid as matter of convenience and economy to the Columbus Southern, and regardless of petitioner's rights. A connection with the track of the Columbus Railroad Company can be made by another route, and without having to cross petitioner's main track. Should said side track be constructed the damage to petitioner will be irreparable. It will be hindered and retarded in the movement of its cars and engines along its main track to and from its depot grounds and terminals; and the risk of accidents to its property, and to travelers and freight received to be transported by petitioner, will be

greatly increased; and the movement of cars and engines of the Columbus Southern, and switching of trains by it along the proposed side track, across petitioner's main track, will result in irreparable damage to petitioner. The proposed side track is not being made for the purpose of constructing the railroad of the Columbus Southern under its charter. Petitioner is remediless unless the Columbus Southern be restrained.

Defendant demurred upon the ground that complainant was not entitled to the relief prayed, nor to any relief, either at law or in equity. The answer of defendant was: In pursuance of its charter, it has constructed and operates a railroad from Columbus to Albany. It petitioned the mayor and council to lay a track from its main track across Eighth street, at the intersection of Ninth avenue, to connect its track with that of the Columbus Railroad Company, to promote the delivery of its freight, in loading cars or otherwise, to that company; which petition has been granted, and defendant has begun laying its track. The Columbus Railroad Company is, by its charter, not only a street car company, for transporting passengers, but also a terminal company, authorized to receive freights, in loaded cars or otherwise, from the several railways converging in Columbus, and transport such freights over its line through the city streets to such points as may be most convenient to the consignees. Under defendant's charter, it has a right to cross, intersect, join, or unite its railroad with any other railroads heretofore or hereafter constructed, at any point in its route, with the necessary turnouts, sidings, and switches, and, in the exercise of such right, it desires and proposes to connect its railroad with that of the Columbus Railroad Company, and as a matter of convenience and economy to itself. Being thus authorized, and having obtained the consent of the mayor and council for the use of the streets, it has full authority to carry out this purpose, without interference from petitioner, whose rights are not involved or affected. The proposed track will not touch, cross, or otherwise affect the right of way of petitioner, which has no right of way on either Eighth street or Ninth avenue, but occupies so much of these streets as are covered by its tracks under a simple easement for that purpose, granted by the city. Petitioner is not a property holder in or upon these streets, nor can its property rights in any way be affected by the construction of the track. The construction of the track will be a great convenience, not only to defendant, but to the merchants and citizens of Columbus and the public at large. Every other railroad company entering the city has connection with the Columbus Railroad Company's tracks, and to

deny defendant this right would be inequitable and unjust. So far as any damage may accrue to petitioner from the crossing of its tracks, it is *damnum absque injuria*. Petitioner has no exclusive right to the use of said streets, or either of them, nor any right to prevent defendant's tracks or that of any railroad company lawfully authorized to cross its track; and the fact that it will be required to observe certain precautions when crossing defendant's track is a burden imposed by the general law, and is in no wise a damage or injury done by respondent to it. Heretofore, petitioner and defendant have been jointly operated, both having used the depots of petitioner, and for this reason defendant has never constructed a depot, either for passengers or freight; but it has consummated arrangements by which it has secured a warehouse on Front street, between Tenth and Eleventh, which will be used for a passenger and freight depot. This warehouse is immediately upon the line of the Columbus Railroad, and defendant desires to connect with said railroad at the intersection of Eighth street and Ninth avenue for the purpose of reaching its depot, as well as for the other reasons above given. In so doing, it will only cross the main line of petitioner; and, under its charter, it has the right to do so, for the purpose of reaching its depot. This will not increase the risk of accidents to petitioner's property; for, under the present arrangements, petitioner's yard, situated south of the point at which defendant desires to cross petitioner's main track, is mainly used for storing cars; for the passengers over petitioner's road alight from and get on petitioner's cars at the Union Depot, and the freight is received and delivered at petitioner's freight depot, both points being north of the point in question. Under the present traffic arrangements the terminal facilities now used by defendant, through petitioner, cost in the neighborhood of \$600 a month; and, when a car load of freight is to be handled by defendant, it is first delivered to the Columbus Railroad Company, then to petitioner, and by petitioner to defendant; and, if defendant is permitted to cross petitioner's track, it will be placed in direct communication with its own depot, and can reach the same without petitioner's intervention. The point at which it is seeking to cross petitioner's track is at grade level; and, under the law, it has the right to cross at such a point without interference or hindrance.

*Goetchius & Chappell* for plaintiff in error.

*W. A. Wimbish* and *Worrill Little*, for defendant in error.

PER CURIAM.—Judgment reversed.

**Power of Commissioners in Making an Award Where One Railroad Crosses Tracks of Another.**—Revised Statutes, Mo., 1879, chap. 21, § 756, provides "that if two corporations cannot agree upon the amount of compensation to be made therefor, or the points and the manner of such crossings and connections, the same shall be ascertained and determined by commissioners appointed by the court." Under the above statute in making an award as to the manner in which one railroad company shall cross the right of way of another, the commissioners have power to order all details of construction which would be ordinarily provided for in an agreement between the parties for such purposes. The court said: "The statute under which the commissioners were appointed gives one railroad company the right to cross the road of any other company, and then provides: 'And if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners, to be appointed by the court, as is provided in this chapter for the condemnation of lands for railroad purposes.'

"The first claim urged in support of the ruling of the trial court is that the clause in the award making it the duty of the defendant, the Kansas City, Independence & Park Railway Company, to substitute stone masonry for pile piers, within one year, is void; that that part of the award cannot be upheld on the ground that the doing of the work is 'compensation' for property taken, because the constitution requires the compensation to be paid in money. If that part of the award is not compensation, then the money awarded and paid was the full measure of damages. The legislature in giving the defendant the right to exercise the power of eminent domain, had the right to attach such conditions as it saw fit. *Union Depot R. Co. v. Southern R. Co.*, 105 Mo. 571. The defendant here had no right conferred upon it to acquire the exclusive use of any part or portion of the defendant's right of way. It had the power to cross the plaintiff's right of way, the compensation to be paid therefor, and the point and manner of crossing, to be fixed by commissioners, if the parties could not agree. The condition attached, over and above payment of compensation, was that the point and manner of crossing should be fixed. Until this was done it could not be told what compensation should be awarded; for it must be evident that the damage sustained depended upon the height, width, and character of the bridge. Compensation awarded and paid in money, on the basis that the defendant would comply with the terms of the award as to the point and manner of making the crossing, satisfies the command of the constitution wherein it requires the compensation for the property taken to be paid to the owner or into court for his use. Of this we entertain no doubt whatever. It is equally clear that the commissioners acted within the scope of the law in requiring the defendant to substitute stone masonry for the pile piers within one year. The method of making these crossings is of vital importance both to the safety of the public and to the roads themselves. The language of the statute is broad. It was designed to confer upon the commissioners power to provide for all those details of construction and operation which would ordinarily be provided for by a contract between the parties themselves had they been able to agree. It has been so held under a like statute. *In re Lockport & B. R. Co.*, 19 Hun, (N. Y.) 38; *In re New York, L. & W. R. Co.*, 35 Hun, (N. Y.) 232.

"It is perfectly clear, we think, that the statute intended the award of the commissioners to stand as a contract between the parties; and we are also of the opinion that the parties have the same rights, and may enforce the award, the same as if it had been their voluntary agreement. Unless this is so, the statute must fail to accomplish what seems to us to be its

manifest object and purpose. It contemplates agreements as to how and of what materials the crossing shall be made, and the manner of using the crossing when made, and hence contemplates agreements to be performed in the future. In the case of *Young v. Chicago & N. W. R. Co.*, 28 Wis. 171, to which we are cited, there was a charter duty imposed upon the company to construct its road across streams so as not to divert water from its natural channel without the consent of the landowner. On the application of a landowner the company was required to construct a culvert under its road so as to restore a stream to its natural channel, and this, too, though the landowner did not bring the suit until 18 years after the diversion. So in *Jones v. Seligman*, 81 N. Y. 190, 3 Am. & Eng. Corp. Cas. 236, the trustees of bondholders of a railroad company were, in a suit for equitable relief, required to build fences and a farm crossing; that duty being imposed upon the company by statute law. If a court of equity may enforce duties like these, there can be no good reason assigned why it may not enforce the performance of that part of the commissioners' report which makes it the duty of the defendant to substitute stone masonry for the pile piers. The defendant commenced the suit to acquire the right to cross the plaintiff's road, got an award, to which it made no objection whatever, and then took possession under the terms thereof. Surely it cannot be permitted now to disregard the award, valid as it is. The plaintiff is entitled to the relief prayed for. The judgment of the circuit court is therefore reversed, and the cause is remanded, to be proceeded with in accordance with this opinion." *Chicago & A. R. Co. v. Kansas City, Independence & P. R. Co.*, (Mo., June 6, 1892,) 19 S. W. Rep. 826.

**Right of Way of One Railroad Over Land of Another.**—In *Hoke v. Georgia R. & Banking Co.*, (Ga., March 26, 1892,) 15 S. E. Rep. 124, it was held a proper discretion to grant an interlocutory injunction to restrain one railroad from condemning a right of way over the land of another where sufficient necessity for the land taken has been shown by the latter company.

**Portion of a Street in Front of Condemned Lot Becomes an Appurtenance of the Lot.**—Where a portion of a street in a city of the first class is vacated, pursuant to the provisions of paragraph 582 of General Statutes of 1889, and a lot abutting thereon condemned, and the perpetual use thereof acquired by a union depot and railroad company for the maintenance of a union depot, the portion of the vacated street situated in front of the lot so condemned becomes, as it were, an accretion or appurtenance of the lot, and passes with the same to the company. The court said: "By the condemnation proceedings, the company acquired the perpetual use of the lot,—a use which in its nature practically excludes any other use or occupancy. Through the appropriation of the lot, the company acquired the incidental and appurtenant rights in the street, and, upon the legal vacation of the street, that portion situated in front of lot 1 temporarily became, as it were, a part of the lot, and passed to the company. The *status* of the vacated portion of the street cannot now be regarded as an open question in this court, and we need only follow a former decision, wherein substantially the same question was considered and determined. *Atchison, T. & S. F. R. Co. v. Patch*, 28 Kan. 470. In that case, Patch was the owner in fee of certain lots in the city of Topeka, and the city council passed an ordinance vacating the street in front of her lots. Afterwards, the railroad company appropriated the lots through condemnation proceedings, and the report of the commissioners showed that they appraised the lots by name, without any survey or indication of what was embraced within the designation. The owner of the fee contended that, as the street vacated was not named in or covered by the commissioners' report,

it became her property upon the passage of the ordinance vacating the street, and she asked for an injunction restraining the company from occupying such part of her property; while one contention of the company was that it passed to the adjacent lot owners, and became in fact a part and parcel of the lots, and was therefore covered by and embraced within the condemnation of the lots. The court did not at that time determine whether, upon the vacation of the street, it reverted to the original proprietor or passed to the adjacent lot owners. The latter view has since been adopted by this court. *City of Belleville v. Hallowell*, 41 Kan. 192. In the Patch case it was held that, if it passed to the adjacent lot owner, then it became something in the nature of an accretion to and would pass in any conveyance of the lot, and that the statute providing for the vacation of the street was only a temporary cession of the street for public use, which might be resumed at any time whenever, in the opinion of the council, it was necessary to re-open the same. Justice BREWER, who delivered the opinion of the court, stated that if the theory that the vacated street passed to the adjacent lot owner was adopted, 'it would seem from the proviso to the section we have quoted that there was no absolute cession of the property to such adjacent lot owner, but only a provisional and temporary giving up of the public use; for the lot owner takes it subject to the right of the city to re-open it without expense. In other words, the city permits the lot owner provisionally and temporarily to hold and occupy the portion of the vacated street in front of his lot. Under these circumstances we think it fair to consider that it becomes, as it were, a part of the lot,—something in the nature of an accretion to it; and, if so, then any conveyance of the lot takes with it this attached portion of the vacated street.' Following the rule of that case, which is decisive of this, we must hold against the contention of the plaintiff in error. The fee of the street not being in the owners of the adjacent lots, as in Massachusetts, the case of *Harris v. Elliott*, 10 Pet. (U.S.) 25, and some other cases cited, do not apply here. Something is said against the validity of the vacation of the street, but it follows from the decision made that the private rights of plaintiff in error are not so infringed as to warrant him in raising that question. Neither is he authorized to appear in behalf of the public; and hence we will not enter upon a consideration of the validity of the vacation ordinance, nor the right to use the vacated portion of the street for the contemplated purposes." *Challiss v. Atchison Union Depot & R. Co.*, 45 Kan. 398.

## JACKSONVILLE, TAMPA & KEY WEST R. CO.

v.

ADAMS.

• (*Florida Supreme Court, Dec. 21, 1891.*)

**Eminent Domain—Judgment in Ejectment as a Bar.**—A judgment in ejectment against a body having the power of eminent domain, is not a bar to the exercise, by such body, of such power as to the land recovered in the action of ejectment.

**Same—Exercise of Right After an Illegal Entry and Ouster.**—Where a body possessing the power of eminent domain has entered upon land without leave of the owner, and without complying with the law regulating the exercise of such power, it may condemn the property entered

upon and thereby secure the right to the legal possession and enjoyment thereof; and this, whether it has or has not been ousted from its former or illegal possession.

**Improvements by Railroad Not an Item in Estimating Damages.**—Where a railroad company, having the power of eminent domain, has entered upon land without the consent of the land owner, and without complying with the law regulating the exercise of such power, and has constructed a railroad track thereon, the value of the improvement thus put by the company on the land cannot be included in estimating the damage sustained by the land owner, in proceedings subsequently instituted under such law by the company or its legal successor, having similar power, to condemn the land, or an easement therein, to the company's use; and this, whether the company has been ousted from the former possession or not.

**Rights of Railroad Pending Appeal by Land Owner.**—Where a railroad company, having the power of eminent domain, has entered upon land without the consent of the owner, and without a certain material requirement of the law regulating the exercise of such power having been complied with, and there has been a judgment in ejectment in favor of the land owner against such company or its legal successor, a lessee for ninety years, and the judgment is affirmed on appeal, the appellate court may,—no conduct in bad faith upon the part of the company appearing,—withhold its mandate of possession to allow a reasonable time for the institution and consummation of new condemnation proceedings. If the new condemnation proceedings are resisted by the land owner, and are dismissed by the trial court, on the ground that there is no constitutional law authorizing the same, and this order is appealed from by the company, the appellate court may withhold its mandate for possession until the decision of such appeal; but it should do so only upon the express condition that its action shall not interfere with the land owner's right to sue for mesne profits for the use or retention of the land by the company.

**APPEAL from Volusia County Circuit Court. Ejectment.**

*A. W. Cockrell & Son*, for plaintiff.

*J. R. Parrott, T. M. Day, Jr., and Fletcher & Wurts*, for defendant.

**RANEY, C. J.**—In the main opinion in this cause (27 Fla. 443) a judgment in ejectment in favor of the appellee, who was plaintiff, was affirmed. Having discovered in our investigations that it was the practice in some appellate courts to withhold the mandate of possession until condemnation proceedings could be prosecuted, we suggested that any motion for such withholding must be made within thirty days. A motion of the character indicated was made by appellant and resisted by appellee, and the mandate for possession was withheld for full consideration of the point.

Motion to  
withhold  
possession.

Pending our consideration of the subject the appellee moved that the mandate for possession should be sent down, the grounds of this motion being (1) that sufficient time had elapsed to enable the appellant to institute and consummate



the proceedings contemplated in the order of the court withholding the mandate; (2) that proceedings had in fact been instituted and pursued to a final judgment of the circuit court of Volusia county, rendered August 10, 1891, refusing to confirm the condemnation of the lands now occupied by the appellant, and sought to be condemned,—such refusal being on the ground (urged by the appellee) that, since the adoption of the present constitution of this state, there has been no valid, constitutional legislation authorizing such condemnation.

As stated in the main opinion, the original condemnation proceedings were instituted in August, 1885, not by the appellant company, but by the Atlantic Coast, St. Johns & Indian River Railroad Company, of which the appellant company leased the road in December of the same year for the period of ninety-nine years. It is now shown that on the first day of April of the present year, and within less than thirty days of the filing of the former opinion,—it having been filed March 4, the appellant company filed a petition in the circuit court of Volusia county, signed and sworn to by an attorney of the company stating that the company exists under the laws of the state; that the railroad of the company is now constructed on and across the lands in question (describing them), and that such lands are essential for the use of the corporation, and that the corporation has made its survey and maps thereof, by which its road or line is designated, and that it has located its road according to such survey, and has filed certificate of such location, signed by the engineer of the corporation, in the office of the clerk of the circuit court of Volusia county; that the use of such lands is necessary for the purpose of operating the railroad, and that petitioner has not acquired the right to use the same; that petitioner is in possession of the portion of the land actually occupied by the railroad track; and that the appellee, administrator, etc., is in possession of the balance, and that he and Helen Maria Adams, in their own right, own or claim to own the land. The prayer of the petition is for an order for summoning a jury to appraise the value of the land and fix the amount of compensation to be paid to the owners, and for such proceedings as are requisite for the petitioner to acquire the right to hold and use the premises for its corporate purposes.

On the day last named the circuit judge made an order directing the sheriff to summon twelve disinterested freeholders, registered voters of Volusia county, as a jury to meet at the courthouse on the seventh day of the same

Statement  
of case.

month, at an hour stated, to proceed under their oaths, duly administered so to do, to take steps to appraise and value the land described in said petition and order, and to fix the amount of the compensation to be made to the owners of the land by the petitioning corporation. On the 8th of April the jury, who appear to have been sworn, met on the premises,—Charles S. Adams appearing for himself in person, and Helen M. Adams appearing by him as her attorney; and the jury then proceeded to view the land, and “heard the allegations of the parties” and “appraised, ascertained, and determined” the value of the tract of land proposed to be taken, and the damage that would be sustained by the owner by reason of the taking thereof, at \$50, and they fixed the amount of compensation to be made to Charles S. Adams, as administrator, at the same amount, and found that he, as such administrator, had the sole estate therein; and they state in their report that such “report and verdict are concurred in by ten of the jurors.” It is, however, signed by the entire twelve.

To this report Charles S. Adams, as administrator and individually, and Helen M. Adams, filed objections, of which the fifteenth and subsequent are as follows: That, since the constitution of 1885 became operative, there are no constitutional legislative proceedings authorizing the condemnation proceedings herein sought to be instituted; (16) that chapter 3595, Acts 1885, as amended by chapter 3712, Acts 1887, does not preserve to the land owner whose land is sought to be condemned “the right of trial by jury” secured by section 29 of article 16 of the constitution, and is void; (17) that such legislation, so far as it involves jury trials, is offensive to section 20 of article 3 of the constitution, which constitutional provision forbids the legislature from passing special or local laws in regard to summoning and impaneling grand and petit juries; (18) such legislation is offensive to section 3 of the declaration of rights,—“the right of trial by jury shall be secured to all, and remain inviolate forever;” (19) the sum of \$50 is wholly inadequate as damages; (20) such legislation is offensive to section 11 of article 5 of the constitution, which ordains a separation of the jurisdiction of the circuit court, in cases at law and in equity; and for other and further grounds apparent upon the face of the proceedings.

On the 10th day of August the circuit judge made an order sustaining the exceptions and protests, and refusing a confirmation of the report, and also refusing “to order further proceedings in this matter, on the ground of the unconstitutionality of the law authorizing the same,” and dismissing the “case;” to all of which the petitioner excepted.

Upon the entry of this order the railroad company entered its appeal to the ensuing term of this court, the judge fixing the penalty of the appeal bond at \$300, which bond has been approved; and the transcript of appeal has been filed in this court, and citation issued, and service thereof acknowledged.

It is urged as a reason why the mandate should be issued, or should not be withheld, that the appellee will be entitled

**Owner's remedy for illegal entry.**

to damages on the basis of the value of the land, including the cross ties and rails and roadbed or works put and constructed on the land by the company. This, in our judgment, is not the law. It is true that if persons or corporations vested with the power of eminent domain enter upon and appropriate private property to their use, without the consent of the owner, before taking the steps required by law to condemn the same, the owner may resort to trespass for damages, ejectment for possession, or to equity for an injunction against the use of the land.

Still, where such an illegal entry has been made by a body possessing the power of eminent domain, it may condemn the property entered upon, and thus secure a right to the possession and enjoyment thereof. If an entry has been made by the express or implied consent of the land owner, it is clear that he should not have the value of what has been put upon the land; and the better authority is that the same rule also applies in the absence of any consent by the owner. *Lewis, Em. Dom. § 507; Baker v. Chicago, R. I. & P. R. Co., 57 Mo. 265.*

Though, as a general rule, things affixed to the freehold so as to be a part thereof become, as against a trespasser or person entering tortiously and affixing them, the property of the owner of the soil, this rule is not applicable

**Improvements on land taken.**

as against a body having the power of eminent domain, and entering without leave and making improvements for the public purpose for which it was created and given such power. The principle controlling the land owner's right to damages in such cases is that he shall have compensation for the damage actually sustained by him, and no more, and that the trespasser's liability shall be likewise limited. This principle is affirmed in *Mississippi, Michigan, Iowa, Illinois, Minnesota, Wisconsin, Oregon, Pennsylvania, and Alabama. Louisville N. O. & T. R. Co. v. Dickson, 63 Miss. 380; Morgan's Appeal, 39 Mich. 675; Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456, 5 Am. & Eng. R. Cas. 378; Daniels v. C. I. & N. R. Co., 41 Iowa, 52; Chicago & A. R. Co. v. Goodwin, 111 Ill. 273; Greve v. First Division R. Co., 26 Minn. 66; Lyon v. Green Bay & M.*

R. Co., 42 Wis. 538; Oregon R. & Nav. Co. v. Mosier, 14 Or. 519; Justice v. Nesquehoning Valley R. Co., 87 Pa. St. 28; Jones v. New Orleans & S. R. Co., 70 Ala. 227, 14 Am. & Eng. R. Cas. 217. See, also, North Hudson Co. R. Co. v. Booraem, 28 N. J. Eq. 450; Burgess v. Clark, 13 Ired. (N. Car.) 109; Railroad Co. v. Deal, 90 N. Car. 110; Texas & St. L. R. Co. v. Matthews, 60 Tex. 215; Dietrich v. Murdock, 42 Mo. 279; Indiana, B. & W. R. Co. v. Allen, 100 Ind. 409, 415, 416, Lewis, Em. Dom. § 507.

The railroad company, say the supreme court of Mississippi in the case from that state cited above, was a trespasser in constructing its road upon land over which it had not acquired the right of way, but it still had the right to acquire the right of way unaffected by the liability incurred for its trespass; and the trespass is not involved in the determination of the due compensation. The continuing right of the company to secure the right of way, in accordance with its charter, and the nature of its entry on the land and annexing chattels to the soil, distinguish the case from that of a trespasser who affixes chattels to the freehold; and the rule of the common law, established when railroads were unknown, is not applicable. In the latter of the cases cited from Michigan, it being an appeal in a condemnation proceeding, a previous proceeding had been taken by the company, which had thereupon entered and built; and afterwards the condemnation was set aside by the supreme court, on appeal, because there had been no notice to Dunlap, the land owner. Afterwards the company instituted the new condemnation proceedings. "The railroad company, whether rightfully or wrongfully," says the opinion, "laid this track while in possession, and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession, and in proceeding to obtain a legal and permanent right to occupy the land for this very purpose.

There would be no sense in compelling them to buy their own property. Whatever right of redress, if any, Dunlap may have, for the tortious occupancy previous to these proceedings, or whatever right of property he might have in case the company abandoned the road entirely, and left the track untouched, we think that so long as it is in possession, and legal measures are proceeding to secure a right to retain

it there, this structure belongs to the company whether intruders or not." In *Daniels v. C. I. & N. R. Co.*, *supra*, Daniels, without whose permission the company had entered and built, recovered judgment in an action for possession against the company, and the judgment was affirmed on appeal, (*Daniels v. Chicago & N. W. R. Co.*, 35 Iowa, 129;) and then the company instituted condemnation proceedings. "Plaintiff," says the opinion, "has suffered no greater damage than would have occurred to him had the defendants pursued the course pointed out by the statute which they are now, by this proceeding, pursuing.

By these proceedings plaintiff is not deprived of the title to the land. The defendant acquires nothing more than the right to occupy it for railroad purposes. Had they been instituted prior to or upon defendants' taking possession of the land, no different right would have been acquired by them than they obtain in the present action. In each case the measure of the plaintiff's damages is the same, namely, the value of the land, without regard to benefits resulting from the improvement." In the same state it is held that a railroad company acquires no right to the land until payment of damages. *Henry v. Dubuque & P. R. Co.*, 10 Iowa, 540. The just compensation required to be given, observes the supreme court of Illinois in *Chicago & A. R. Co. v. Goodwin*, is for that which is taken from the owner, and which is of value to him, and not for something he never owned. In *Justice v. Nesquehoning Valley R. Co.*, *supra*,—the Pennsylvania Case,—there had also been a judgment in ejectment in favor of the land owners. The court held that the entry was not the case of a mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having the right to enter and place the materials on the land taken for public use,—materials essential to the very purpose which the state has declared in the grant of the charter,—yet a trespass, by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it; for which injury the citizen is entitled to redress, but not beyond his injury, nor extending to taking the personal chattels of the railroad company laid down for the benefit of the public.

The features distinguishing the case from that of an ordinary trespass were held to be the right to enter on the land under the authority of law to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity

for their use in the execution of the public purpose; and, lastly, the power to retain and possess the chattels, and the structures they compose, by a valid proceeding at law, notwithstanding the original illegality of the entry. The reasoning of the supreme court of Alabama in *Jones v. New Orleans & S. R. Co.*, *supra*, is substantially the same as that of the Pennsylvania court.

The cases relied upon by the appellee to support his contention do not overcome the conclusions reached by us. In *New York & G. L. R. Co. v. Stanley's Heirs*, 35 N. J. Eq. 283, 10 Am. & Eng. R. Cas. 345, the same rule as to damages was enforced, and an injunction granted to restrain an action of ejectment. The original entry had, however, been made under an agreement between a predecessor railroad company and the land owner, of which agreement such railroad company had not, nor had any of its successors, carried out the undertaking to erect a certain depot. It was remarked in this case, as pointed out by appellee's counsel, that on no other hypothesis than this agreement would the appellant have a standing in court to stay the land owner's suit for possession; but of this language it is observed in *Paterson, N. & N. Y. R. Co. v. Kamlah*, 42 N. J. Eq. 93, 98, 28 Am. & Eng. R. Cas. 250, that the court was not laying down the rule to be observed in all cases, but was speaking merely with reference to the particular circumstances of that case. *Schroeder v. De Graff*, 28 Minn. 299, 5 Am. & Eng. R. Cas. 298, was an action of trespass to recover damages against a railroad company for constructing a road across the plaintiff's land without his permission; and it was held that if the ties and rails had increased the value of the farm the fact of such increase should be considered in estimating the amount of damages, but, if the farm was in no way benefited or enhanced in value by the ties and rails being laid across it, no deduction from the damage actually done to the farm should be made on account of the value of the ties and rails. The question of whether the value of the ties and rails should be excluded or be included in valuing the land on a condemnation proceeding was not before the court, nor mentioned.

It is true the lower court instructed the jury, in connection with the doctrine just stated, that the ties and rails had become a part of the realty; but the theory of the decision as to the rule of damages was that the land owner could not be made the unwilling purchaser of the ties and rails, or required to pay for them, by crediting their value on damages done the land in constructing the road. In *Cohen v. St. Louis, Ft. S. & W. R. Co.*, 34 Kan. 158, 22 Am. & Eng. R. Cas. 116, the railroad company had entered with the assent

of the plaintiff or his agent, and the plaintiff sued in trespass.

There was on the land at the time of the entry an old grade which had been constructed by another company and abandoned. It was held that the increased value given to the land by the presence of the old grade should be considered in estimating the damages, but that such increased value was not necessarily what it had cost to build the grade; yet it was also held that no recovery could be had for the increased value given the land by the improvements put on it by the defendant company.

In this opinion it is, moreover, said: "It has even been held that where a railroad company enters upon land as a technical trespasser, and afterwards procures the land for its right of way by condemnation proceedings, it is not compelled to pay for the improvements which it itself made upon the land while it was technically a trespasser, and before it legally procured its right of way." Citing 87 Pa. St. 28; 41 Iowa, 52; 42 Wis. 538; 26 Minn. 66, *supra*. "This," observes the opinion, "seems like justice." The decision in *Hunt v. Missouri Pac. R. Co.*, 76 Mo. 115, is that where a railroad company, having obtained a decree for the condemnation of a tract of land without the knowledge of the owner, erected upon it a building of a permanent character for a depot, and afterwards the decree was held void, the building becomes a part of the realty, and could not be removed by the company. The facts in *Price v. Weehawken Ferry Co.*, 31 N. J. Eq. 31, were that a railroad was built on land on which complainant held a mortgage of prior date, duly recorded, and the charter of the company did not permit the building of the road there, but expressly prohibited it.

The road was not built under condemnation proceedings, but under a grant of right of way from the mortgagor. The question was whether one having a lien on the railroad for building the same could have the track or improvements reserved from a sale under the mortgage. The opinion holds that there was no paramount power of condemnation, like that in *North Hudson Co. R. Co. v. Booraem*, 28 N. J. Eq. 450, cited *supra*,—no power (the right of eminent domain) to take the property superior to the right of both mortgagor and mortgagee; that where such power exists it confers the power to take the property on making just compensation, which compensation, in so far as the value of the land is concerned, is to be estimated as of the time when possession is taken, and therefore cannot include the value of improvements subsequently put on the property by the party entering under such right; but when the entry is not under that right the right to take the property on making compensation

does not exist, and the party entering and improving does both subject to the right of the prior mortgagee to sell both the land and such improvements. *Meriam v. Brown*, 128 Mass. 391, is to the effect that a railroad corporation which has constructed its track upon a person's land without filing a written location or presenting a plan thereof, or paying or tendering to the land owner any damages for the land so taken, cannot enter upon the land for the purpose of removing the rails laid upon the roadbed, and structures placed upon the land,—such property becomes a part of the realty; and the fact that the original entry and construction were made without objection from the mortgagor in possession cannot avail against the title acquired by the mortgagee by the subsequent foreclosure of the mortgage. The mortgage was of a date prior to the construction of the road. *Lake Erie & W. R. Co. v. Kinsey*, 87 Ind. 514, 14 Am. & Eng. R. Cas. 309, decides that where a railroad company has entered, as it legally might, under condemnation proceedings, it having deposited the amount assessed by the appraisers and there is an appeal, and on the appeal the assessment has been increased, but the company has not paid the increased amount, the owner may recover in ejectment without paying for the improvements placed on the land.

In *Graham v. Connersville & N. J. C. R. Co.*, 36 Ind. 463, the conclusion reached is that where a railroad company has, without the consent of the owner, and without color of title, entered upon land, and occupied the same, building a depot and hotel thereon, and afterwards seeks to appropriate the land under the authority of law, the value of the land at the time of the legal appropriation, with the improvements thereon, constitutes the amount for which the company is liable to the owner of the land.

In California, in *California Southern R. Co. v. Armstrong*, 46 Cal. 85, condemnation proceeding had been commenced against a large number of land owners, but there was no service as to the owners of one tract; yet pending such proceedings it was built upon by the railroad company. There was judgment as to the other lands, but none as to this tract, which the owners sold to Armstrong. Afterwards the proceeding was dismissed as to the particular tract and new proceedings of condemnation were begun against Armstrong. There had been an order of court in the former proceeding allowing the railroad company to enter upon and retain possession of the lands pending the proceedings, and bond had been given as required by the statute. Answering the contention that the value of the improvements should be included in estimating damages in the second proceeding, it



is said by the court: "Neither the constitution nor the statute contemplates that a person whose land is taken in the exercise of the right of eminent domain shall be entitled to anything beyond a 'just compensation.' He is to be paid the damages he actually suffers, and nothing more. But to hold that in addition to the fair value of the land taken, and such other damages as he may suffer by severing it from the remainder of his tract he shall also recover the value of a railroad track, in the construction of which he never expended a dollar, and which was built by the plaintiffs at their own expense, would be to defeat the obvious intent of the statute by an over technical construction of it."

In *U. S. v. Land in Monterey Co.*, 47 Cal. 515, a condemnation proceeding was begun by the government in 1870 against lands which it had in 1854 entered upon against the will of the owners, erecting thereon a store building which it had ever since occupied as a lighthouse; and it was held that the value of the improvements should be included in estimating damages. "The law," says the opinion, "did not authorize the United States to take the possession of these lands *manu forti*; and their agents, in entering upon them and ejecting the defendants, were mere tort-feasors."

The case is, in this important respect, wholly unlike that of *California Southern R. Co. v. Armstrong*, 46 Cal. 85. In that case the road track was constructed by the railroad company while its possession of the land of the defendant was rightful, being held at the time in pursuance of pending proceedings for its condemnation, and these proceedings having been dismissed after the construction of the track." The latter of these cases is also cited by the appellee. It does not pretend to overrule the former case, but distinguishes the two by the character of the original entry.

Of the cases cited by the appellee, that of *Graham v. Connorsville & N. J. C. R. Co.*, 36 Ind. 463, alone can be claimed to be authority for the contention that in an authorized proceeding for condemnation the improvements put upon the land by a railroad company having the right to exercise the power of eminent domain, yet not doing so in a valid manner, should be included in estimating the land owner's compensation for damages. If it be that the rule of the former of the California cases is not more applicable than that of the latter to the case before us, of which we are not at all satisfied, our views are not shaken by the latter case.

The clear weight of authority, the better reasoning, and true right of the matter are against the position of appellee.

II. The authorities at our hands bearing directly or by analogy on the subject of the power and duty of this court to

suspend the warrant are those mentioned in the succeeding paragraph.

In *Pittsburg & S. R. Co. v. Jones*, 59 Pa. St. 433, the railroad company had entered upon the land under an agreement to purchase, and had built its track thereon. The company failed to pay the purchase money, and there was a decree in favor of the vendors for the sale of the property for the amount due; and the same was sold by the sheriff under the decree, and the purchasers brought ejectment against the company. There had never been any condemnation proceedings against either the former owners or the purchasers at the sheriff's sale. It was said that the sheriff's vendees took the whole title to the land, the legal title of the vendors, and the equitable title of the railroad company, and not subject to any easement or right of the company to use any part of it for the track of its road. But it was held by the court that the company, under the provisions of its charter, had the undoubted right to appropriate the land, and to acquire a right to its use, upon making compensation to the owners for the damage sustained thereby; and that as the land was indispensably necessary to the company, and the company had the right indicated, it was but just and equitable that, while affirming the judgment in ejectment, all proceedings thereon should be ordered stayed for such reasonable time as might be necessary to enable the company to take proceedings to condemn the land; and that there was no doubt of the court's authority to make the order, or of the propriety of the order, under the circumstances. *O'Hara v. Pennsylvania R. Co.*, 2 Grant, Cas. (Pa.) 241. See also 5 U. S. Dig. (1st Series) p. 300, § 150.

In *Pittsburg L. E. R. Co. v. Bruce*, 102 Pa. St. 23, 10 Am. & Eng. R. Cas. 1, a canal company which had condemned and acquired the easement of a right of way over, and not a fee in, the lands appropriated by it for canal purposes, afterwards became insolvent, and all its properties and franchises were sold to a railroad company; and it was held that the latter company could not construct tracks on such canal right of way without making compensation to the owner of the land, and that the owner of the fee was entitled, where such tracks had been laid without making or tendering compensation, to recover in ejectment against the railroad company; that the canal having been abandoned, as such, its charter as a highway went with it, and the use and occupation of the land reverted to the owner in fee. "We may," says the opinion, "here add, in order to avoid all mistakes and misapprehensions, that the defendants might secure a right of way and secure the work and property which it has

put upon the plaintiff's land by having an assessment of damages as provided by law, and if the plaintiff should refuse a stay of execution until that can be accomplished the court below on application may for that purpose interpose its injunction." Citing *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28, in which execution had been stayed in the lower court.

The case of *Conger v. Burlington & S. W. R. Co.*, 41 Iowa, 419, is one in which the railroad was built with the knowledge, but without any express permission, of the land owner. The land owner took proceedings to have the damages assessed, and afterwards brought ejectment; the damages not having been paid.

The doctrine that the fact that the land owner knowingly permits a railroad company to enter upon his land and build its road does not estop him from maintaining an injunction restraining the company from using the right of way without making compensation therefor, is fully recognized, (*Hibbs v. Chicago & S. W. R. Co.*, 39 Iowa, 340;) and it is asserted that there is no difference in this respect between a proceeding for an injunction and an action of ejectment. The judgment in favor of the land owner was affirmed, but the court said that the action was to be regarded as a mere means of coercing payment of the damages; that if the damages had not been assessed, the defendant might, notwithstanding the action, cause the damages to the land owner to be assessed, and upon payment of them could have the execution, if issued, recalled, and would be entitled to the aid of a court of equity for that purpose; but that in this case, as the damages had been assessed, nothing but payment of them was wanting to entitle the defendant to the continued use of the plaintiff's land; and a suspension of the execution was ordered.

In *Patterson N. & N. Y. R. Co. v. Kamlah*, 42 N. J. Eq. 93, 28 Am. & Eng. R. Cas. 250, Kamlah claiming that he had never received compensation for land used by the railroad company, brought ejectment to recover the land, and thereupon the company obtained a preliminary injunction to stay the action, on the ground that it had the legal title to the land, but, being unable to establish it, prayed a discovery, and also insisted that, if it should be unable to establish its legal title, it had an equitable title, which equity ought to protect by decreeing that it retain possession of the premises, and consummate its right thereto by awarding just compensation to Kamlah. It was held, after answer, that the injunction should be retained on the ground that the possession of the premises was originally taken with the knowledge of Kamlah, and continued for about 20 years as part of the

complainant's road, with defendant's acquiescence, during which time various negotiations had been had between the parties as to compensation, and that the company, the land being indispensable to it, might, by proceeding under its charter, condemn the land, or, if it had not such charter power to condemn, it might make compensation, to be ascertained and awarded in the court of equity.

In this case it was said: "Where possession has been taken of land for a public work, and the work has been constructed upon it, but no compensation has been made for the land, if the company in taking possession has acted in good faith under acquiescence of the owner, or by mistake as to the property, or as to the validity of the authority given it so to occupy, and the property is in public use, equity will not permit the company to be disturbed in its possession, provided it make compensation, if equity shall so require." *Bartleson v. City of Minneapolis*, 33 Minn. 468, (decided June 15, 1885), is a case in which there had been condemnation proceedings and an award of \$400 in August, 1881.

The law regulating the subject provided that after the award became final the city council should cause the amount thereof to be paid, and that in case such payment was not made within one year after the confirmation of the award or the determination of an appeal the proceedings should be deemed to be abandoned, and that before the payment of the award the owner should furnish an abstract of title showing himself to be entitled to the damages allowed, and that in case of neglect to furnish the abstract, or of doubt, the amount awarded should be set apart for whomsoever should be entitled to it, and should be paid to any person showing himself to be so entitled. It was admitted on the trial that the plaintiff was the owner, except for the condemnation proceedings shown by the defendant. No compensation for the land was ever paid or set apart until July 25, 1884, when the city council set apart in the city treasury the sum of \$400. It was held that the condemnation proceedings were by the failure to pay or set apart the amount of the award within one year, *ipso facto*, abandoned, and that Bartleson was entitled to recover in ejectment. At the close of the opinion is the following observation: "To the suggestion that the court may grant to the city equitable relief in the premises, and, upon equitable considerations, sustain its possession, it is enough to say that, if the city could upon any case be relieved from the consequences of the council's failure to comply with the law, no such case is presented by the pleadings or made by the facts found."

In the cases of *Harrington v. St. Paul & S. C. R. Co.*, 17

Minn. 215, (Gil. 118), and *Lohman v. St. Paul S. & T. F. Co.*, 18 Minn. 174, (Gil. 157), in the former of which cases no proceedings to condemn had been taken, and in the latter there was, as here, a failure of the commissioners to give notice to the land owner, it was urged that the land owner was entitled to an injunction against the further use of the premises by the railroad company; but a stay was allowed to permit the institution of condemnation proceedings. In the latter of these cases it is remarked: "But it appears that under this appeal, or by some arrangement of the parties, the defendant has constructed and is now operating the road over defendant's land, so that great public inconvenience would result if the injunction were to be enforced, and as it further appears from defendant's answer that the proceedings to condemn were taken in good faith, and with an honest purpose on the part of the plaintiff to comply with the law, we are of the opinion that the injunction should not be allowed to become operative until suitable opportunity is given to defendant to acquire the right to appropriate plaintiff's land, either by negotiation or by fresh proceedings to condemn."

In *Strong v. City of Brooklyn*, 12 Hun, (N. Y.) 453, the plaintiff recovered judgment for possession of a piece of land which the city was using for public purposes, and the city obtained an order staying the enforcement of the judgment on the ground that it was about to condemn the land. The order was reversed by two justices, they holding that generally stays of process are granted by reason of something which has taken place pending the litigation or after the rendition of the judgment, and that if no reason of that kind exists the judgment must have its full force, and that no distinction was to be made in the case of a body entitled to the right of eminent domain.

In *Story v. New York El. R. Co.*, 90 N. Y. 129, 179, 7 Am. & Eng. R. Cas. 596, where it was held that the elevated street railroad structure which the company was at the commencement of the suit about to erect, and had since then actually erected, constituted a taking and appropriation of plaintiff's property without compensation, of the seven conclusions reached by the court, as summarized in the opinion of TRACY, J., the seventh was: "The injunction prohibiting the continuance of the road in Front street should not be issued until the railroad company has had reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same."

In treating of injunctions to prevent the use of property until damages are paid, it is said by Lewis on Eminent

Domain, § 634,—citing *Young v. Harrison*, 6 Ga. 130; *Gammage v. Georgia Southern R. Co.*, 65 Ga. 614, 10 Am. & Eng. R. Cas. 731; *Lohman v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 174, (Gil. 157;) *White v. Nashville & N. W. R. Co.*, 7 Heisk. (Tenn.), 518,—that where the right to relief exists at the time of filing the bill, but the defendant has the power to acquire the property, and an injunction will be prejudicial to the public or the defendant, and its postponement no detriment to the plaintiff, the court will withhold the injunction until a reasonable opportunity is afforded to ascertain and pay the compensation. The authorities sustain the text. See, also, *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215, (Gil. 188.)

All of these cases, except that of *Bartleson v. City of Minneapolis*, 33 Minn. 468, and *Strong v. City of Brooklyn*, 12 Hun, (N. Y.) 453, sustain either expressly or by analogy the power to withhold the mandate for the purpose desired in this cause; and the excepted cases are not, considering the facts of this case, authority against our power or duty to do so. The power of courts to temporarily stay the issuing of executions is exercised, says Mr. Freeman, in an almost infinite variety of circumstances, in order that the ends of justice may be accomplished. In many cases this power operates almost as a substitute for proceedings in equity, and enables the defendant to prevent an inequitable use of the judgment or writ. *Freem. Ex'ns*, § 32; *Mitchell v. Duncan*, 7 Fla. 13; *Robinson v. Yon*, 8 Fla. 350; *Granger v. Craig*, 85 N. Y. 619. The withholding of the writ of possession, in cases of this kind, rests upon the same principle that the withholding of an injunction is founded on.

There is no such difference between the constitution of our state and those of the states in which the above decisions were made as makes these decisions inapplicable here.

The power invoked is one liable to be abused (*Freem. Ex'ns*, § 32.) and should, in our judgment, be exercised with extreme caution; but we are entirely satisfied that the case before us is a proper one for its exercise.

The facts of the case are, of course, such as necessitated the affirmance of the judgment in ejectment in favor of the appellee; yet it is true that the appellant is a lessee under the company by which the original condemnation proceedings were instituted, and that the appellee, whose action was not commenced till March, 1887, knew early in 1885 that the lands were occupied, which occupation must, as the lease was not made till December of that year, have been by the lessor company, although the appellee does not say which company it was. It is also true that there is in the record

such evidence of notice having been given to the appellee by the condemnation commissioners, by advertisement, as renders the contest of the title by the appellant, one of good faith, as it does its entry under the lease; and there is nothing in the record tending to show that the appellant has acted otherwise than in good faith and with honest purposes in any of these proceedings. Moreover, upon the rendition of our judgment affirming the recovery in ejectment, new condemnation proceedings were promptly instituted and duly prosecuted against the resistance of the appellee and the other owner of the land; and the circuit judge dismissed them on the ground that our legislation is invalid and unconstitutional.

From this judgment an appeal has been taken to this court, and the appeal transcript has been filed. In view of this decision the railroad company has certainly done all it can do, unless and until the judgment appealed from shall be reversed. It is also entitled to a decision of the question on the appeal. If that judgment is erroneous, the company should not suffer from it.\* If it is right, any damage the appellee may sustain by reason of the possession of the land can be compensated in money, and is wholly inconsiderable, in comparison with the damage and inconvenience which the appellant and the public will incur should we refuse to withhold the mandate. To permit the mandate to go now would not only be contrary to the principle and practice announced and established by the above authorities, but, it seems, would, in view of our affirmance of the judgment in ejectment, put it beyond the power of the circuit court to grant any similar relief as to its own writ, unless we should direct the allowance of such relief. *Freem. Ex'ns*, § 32; *Marysville v. Buchanan*, 3 Cal. 212; *Dibrell v. Eastland*, 3 Yerg. (Tenn.) 506.

A judgment in ejectment is never a bar to condemnation proceedings, nor does it award any recovery of mesne profits for occupation of the land after its rendition; nor can the question of such subsequent mesne profits be considered in condemnation proceedings, they being the subject of an independent action. There has been no obstacle to the collection of the recovery for mesne profits and costs adjudged in the action of ejectment, even if, in view of what has passed at our bar, it could be thought that the same were not paid last spring. The withholding of the mandate should not interfere with appellee's right to sue for the mesne profits accruing subsequently to those recovered in the ejectment action; and, upon condition that it shall not, the mandate will be with-

Ejectment  
as bar to  
condemnation  
proceedings.

held till the further order of the court, and the motion of the appellee will be denied. It will be ordered accordingly.

**Eminent Domain—Value of Improvements Placed on Land by Railroad Before Commencing Proceedings as an Element of Damage.**—See note, 47 Am. & Eng. R. Cas. 150; Albion River R. Co. v. Hessner (Cal.) 44 *Id.* 125, note 129.

**Right of Appeal in Condemnation Proceedings.**—An appeal lies to the supreme court from an order of the circuit court dismissing the proceeding instituted under Florida Act of February 12th, 1885, chap. 3595, as amended by Act of June 8th, 1887, chap. 3712, for the condemnation of land for railroad purposes, although this statute is silent on the subject of an appeal. Jacksonville, T. & K. W. R. Co. v. Adams (Fla., June 9th, 1892) 11 So. Rep. 169.

Proceedings for the condemnation of land for railroad and canal purposes under the Act of February 12, 1885, chap. 3595, as amended by that of June 8, 1887, chap. 3712, are in the circuit court, in the exercise of its judicial powers as a court of chancery, and not before the circuit judge as a commissioner, or special tribunal, or as distinct from the court. Jacksonville, T. & K. W. R. Co. v. Adams (Fla. June 9, 1892,) 11 So. Rep. 169.

**Appeal from Assessment of Damages—Change of Venue.**—Where, by statute, commissioners to assess damages in condemnation proceedings of land for railroad purposes are appointed by the court in the judicial district where the land was situated, and the statute gave the court exclusive jurisdiction, subject only to the right to change the venue for cause, *held*, that where the judicial district court in and for the county of Lewis and Clarke appointed commissioners to assess damages for lands in Jefferson county, in the same district, and their report was filed in Lewis and Clarke county, an appeal to the district court of Jefferson county, without first obtaining a change of venue to that county, gave the court no jurisdiction. The court said: "The question which we intend to consider relates to the jurisdiction of the district court of the county of Jefferson over the subject. The learned counsel for the respondents upon this hearing were not connected with this proceeding when the original appeal was taken by the railroad company, and admit that they are not fully satisfied thereon. The statute which was in force in February, 1887, and under which the courts assumed to act, has not been amended since that time. Rev. St. div. 5, § 307; Comp. St. div. 5, § 685. The following provisions are applicable to this contention: The commissioners 'may be appointed upon application by any party to any district court or judge thereof in any of the judicial districts in which the lands or premises to be taken lie.' The appraisement is to be returned 'into court,' and the amount awarded is to be paid to the 'clerk thereof.' The 'party feeling aggrieved by said assessment may within thirty days file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained.' The 'party appealing shall give bonds \* \* \* for the payment of any costs that may arise upon such appeal to the district court.' If the corporation 'shall file with the clerk of said court an offer to confess judgment, \* \* \* the claimant shall pay the costs.' The section concludes with this proviso: 'Provided, that the district court of the district in which the land or premises are situated shall have exclusive jurisdiction in all judicial proceedings had in pursuance of this section and of section 302, aforesaid, subject to the right to change the venue for cause.' From the year 1887, when this proceeding was commenced, until the 8th day of November, 1889, when the territory was admitted into the Union, the counties of Lewis and Clarke and Jefferson were in the same judicial district.

51 A. & E. R. Cas—36.



Under the constitution of the state the counties of Jefferson, Beaverhead, and Madison formed the fifth judicial district. The venue of this proceeding was never changed by any order of the court, and no motion for this purpose was ever made. By virtue of the statute, *supra*, the district court in and for the county of Lewis and Clarke had jurisdiction of the matter to a certain extent, and the award of the commissioners was filed therein. Until the venue had been changed according to law, we do not know of any authority for the filing of the notice of appeal in the district court of Jefferson county. The subsequent action of the court below was therefore without jurisdiction, and void. It is ordered that the judgment be reversed, and that the cause be remanded for further proceedings in conformity with this opinion." *Allport v. Helena B. V. & B. R. Co.* (Mont., May 23, 1892,) 29 Pac. Rep. 966.

**Evidence on Appeal as to Amount Awarded by Commissioners—Measure of Damages.**—Upon an appeal from a proceeding to condemn a right of way for a railroad, testimony of the amount awarded by the commissioners is not admissible in evidence; and a statement made by the court in its charge to the jury, informing them of the amount so awarded by the commissioners, is unwarranted and erroneous. The measure of damages in such a case is the difference between the market value of the tract from which the right of way is taken immediately before and after the time when the land was actually condemned and appropriated. *Chicago K. & N. R. Co. v. Broquet*, 47 Kan. 571.

**Possession and Occupancy of Land Under Lease—Depositing Damages in Court Pending Appeal.**—Where a railroad has been in possession of land and operating a road thereon under a lease from a part of the owners, it may appeal on a judgment against it for damages in condemnation proceedings without depositing in court the amount of the judgment or restoring possession of the land. *Ashland Coal & Iron R. Co. v. Davidson* (Ky., Oct. 6, 1892,) 20 S. W. Rep. 270.

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## LIVERMON

*v.*

## ROANOKE & TAR RIVER R. CO.

(109 N. Car. 52.)

**Eminent Domain—Limitations—Regulation by General Railroad Act of Railroads Created by Special Act.**—Under a statute (Code N. Car. sec. 701) which provides that the general railroad act (Code chap. 49) shall apply to railroad corporations created by special act of assembly, and shall govern and control, anything in the special act to the contrary notwithstanding, unless the sections of the general act intended to be repealed by such special act shall be specially referred to, and as such specially repealed, where there is a provision in the charter of a railroad company, by which it is granted "the powers and incidents of the North Carolina railroad company, and other corporations of like nature created by the laws of the state," such provision does not make applicable a provision in the charter of the North Carolina railroad company, that two years shall bar a claim for damages or compensation by the owner of lands over which it has constructed its road, nor, in any way, prevent the application of the general railroad act, which provides that, a railroad company can only acquire title to a right of way by purchase or proceedings to condemn, and

so long as the company occupies the land without title, the owner is not barred unless its possession has been adverse for such length of time as to mature title as in ordinary cases.

**Rights of Purchaser of Land Taken.**—Where, under the general railroad act (Code chap. 49,) a railroad company constructs its road over land without acquiring title to a right of way by purchase or condemnation, and the owner of the land subsequently sells and conveys it, the purchaser may sue the company for compensation.

**Mortgagee's Rights, when Mortgagor Grants Right of Way.**—Where a right of way over mortgaged land is granted by the mortgagor, without the consent of the mortgagee, and where no proceedings are instituted against the mortgagee to condemn the lands, the mortgagee's interest is not affected, and a purchaser at a foreclosure sale under the mortgage, or his grantee, is entitled to compensation from the company, though he cannot recover damages for the entry by the railroad company before he acquired title.

**APPEAL from Bertie County Superior Court.**

Action to recover compensation for land taken for right of way.

Plaintiff had title to the land under the foreclosure of a mortgage. Defendant claimed title to the right of way by virtue of a deed from the mortgagors before the foreclosure, the road having also been constructed before the foreclosure. No consent to the right of way was obtained from the mortgagees. Defendant contended that the action was barred by the statute of limitations, in that it had not been brought within two years from the accruing of the cause of action, and relied on its charter, (Act. N. C. 1885, chap. 218,) which granted to it "the powers and incidents of the North Carolina Railroad Company, and other corporations of like nature created by the laws of the state." The charter of the North Carolina Railroad Company provided that the owners of land over which its road should be constructed should apply within two years next after such part of the road should be finished, or should be barred from recovering said land, or compensation therefor. Defendant also contended that plaintiff could not maintain the action because she was not the owner of the land at the time of defendant's entry thereon, and that the deed from the mortgagors gave them title to the right of way.

*Winston & Williams*, for appellant.

*Martin & Peebles*, for appellee.

**SHEPHERD, J.**—1. The plea of the statute of limitations cannot be sustained. It is true that the charter of the defendant provides that it shall have "the powers and incidents of the North Carolina Railroad Company and other corporations of like nature created by the laws of the state," but this language is exceedingly indefinite upon the question under

consideration, as the charters of some of these corporations contain provisions barring the owner's claim for damages or compensation after a certain period, while others provide for no such limitation whatever. *Land v. Wilmington & W. R. Co.*, 107 N. C. 72, 47 Am. & Eng. R. Cas. 161. Even had the charter of the North Carolina Railroad Company been particularly referred to, the two-years bar therein prescribed would not have prevented the application of the general railroad act, (chapter 49, Code,) which was enacted prior to the granting of the defendant's charter. Under the general act, as construed by this court in *Land v. Railroad Co.*, *supra*, the defendant can only acquire title to the right of way by purchase or by proceedings to condemn, and so long as it occupies the land without title the owner is not barred, unless the defendant's possession has been adverse, and for such length of time as to mature title, as in ordinary cases.

Application  
of general  
railroad act.

Thus it appears that there is a very great difference between the charter of the North Carolina Railroad Company and the general act, and it was clearly the policy of the legislature that the provisions of the latter should not in any material particular be repealed by implication. Hence it was enacted (Code, § 701) that the general act "should govern and control, anything in the special act of assembly to the contrary notwithstanding, unless in the act of assembly creating the corporation the section or sections [of the general act which are intended to be excluded] shall be specially referred to by number, and as such specially repealed." See *Durham & N. R. Co. v. Richmond & D. R. Co.*, 106 N. Car. 16, 44 Am. & Eng. R. Cas. 168, which is conclusive upon this point.

It is insisted, however, that, as the plaintiff was not the owner of the land at the time of the entry and the completion of the road, she is not entitled to maintain this proceeding. The cases from other states, cited by the defendant's counsel, sustain this view so far as the recovery of mere damages, incident to the unlawful entry, is concerned. They may also be applicable where the railroad company acquires a right by a simple entry, leaving the damages and compensation to be subsequently assessed. In such cases the claim of the owner is said to be personal, and does not pass to a purchaser by an ordinary conveyance of the land. The principle does not apply where, as in our case, (under the general act,) the railroad company acquires no right whatever until, either at its instance or that of the owner, proceedings have been instituted to condemn the property. Until this is done the company occupies the land without title, (*Land v. Wilming-*

ton & W. R. Co., *supra*.) and it would seem quite plain that the occupation of a trespasser ought not to take away the owner's power of alienation. In our case the only authority to enter was given by the mortgagor and it is admitted that the consent of the mortgagee has never been obtained. It is well settled that "a deed from a mortgagor conveys only his interest, and is subject to the mortgage." Lewis, Em. Dom. § 289. To the same effect is Mills, Em. Dom. § 74, from which work we extract the following: "In the case of *Wade v. Hennessy*, 55 Vt. 207, in which the company, instead of condemning the land by due process, took a deed from the mortgagor, a mortgage having previously been given by the grantor, and recorded, it was held that the fact that the railroad company, under the exercise of the right of eminent domain, might have taken the mortgagee's interest in the mortgaged premises, and thereby have obtained an unimpeachable title, did not vary the relations of the railroad company to the holder of the mortgage, as it did not exercise that right, but contented itself with the right it acquired by said deed." Right of way granted by mortgagor.

To the proper exercise of the right of eminent domain it is indispensable that compensation be made to the owner of the property taken by the payment of an equivalent in money. The railroad company must make all parties claiming the title parties to the proceedings. \* \* \* If this is not done the railroad must either redeem or seek protection by the exercise of the right of eminent domain under the statute against the mortgagee." See, also, *Wilson v. European & N. A. R. Co.*, 67 Me. 358; *Beck v. Louisville N. O. & T. R. Co.*, 65 Miss. 172; 2 Wood, Ry. Laws, § 244. The mortgagee's interest, then, not having been affected by the deed of the mortgagor, and the mortgage having been foreclosed, it would seem very clear that the title passed to the plaintiff, who purchased the entire tract under the foreclosure sale. It seems equally clear that while she cannot recover damages incident to the entry made before she acquired the title, she may recover compensation for the land, the title to which can only vest in the defendant by virtue of this proceeding. The defendant has been content to occupy the land without title, and it was charged with notice of the mortgage. Mills, Em. Dom. § 103. It did not offer to redeem, as it might have done, but suffered the title to pass to the plaintiff. Rights under foreclosure sale.

We are of the opinion that the plaintiff is entitled to compensation for the land, the title to which is to be vested in the defendant by virtue of this proceeding. Error.

**Eminent Domain—Limitation of Actions to Recover Damages.**—See *Shortle v. Terre Haute & I. R. Co.*, and note, *post*.

**Rights of Mortgagor in Proceedings to Condemn Mortgaged Land.**—In condemnation proceedings of mortgaged land, since the damages awarded stand in the place of the land and can be subjected to payment of the mortgage, it is proper that the mortgagor be awarded the full value of the land. The court said: "In the proceeding to condemn lot 17 the commissioners assessed the damages at \$500, and stated in their report that this sum was the damages B. F. Sanders, the owner of the equity of redemption, had sustained, without referring to plaintiff's interest, and this is assigned for error. The proceedings show, however, that the damages awarded covered the full value of the whole lot. This seems to be an appropriate, if not the proper, course to pursue, where an encumbrancer is made a party to a condemnation proceeding. 1 Jones, *Mortg.* (4th Ed.) § 681*a*. The damages awarded to the owner stand instead of the land, and can be subjected to the payment of the encumbrance. *Calumet River R. Co. v. Brown*, 136 Ill. 322, 47 Am. & Eng. R. Cas. 199; 12 *Lawy. Rep. Ann.* 84, and notes; *Goodrich v. Board of Com'rs*, 47 Kan. 355. 'The burden of proof is on the mortgagee to show to what extent he has a claim upon the funds, and that question is then litigated between the parties in interest, and not at the cost of the taker of the land.' 1 Jones, *Mortg. supra*. 'The land owner is entitled to full damages, and the question as to the distribution of the money between the mortgagees is a question which does not concern the plaintiff.' *Chicago, M. & St. P. R. Co. v. Baker*, 102 Mo. 553. But, aside from this, Sanders filed his claim for the money, of which claim plaintiff was duly notified, and still he failed to put in an appearance, and the court thereupon ordered the clerk to pay the money to the former. This the court had the power to do. *Hilton v. City of St. Louis*, 99 Mo. 207; *Chicago, M. & St. P. R. Co. v. Baker, supra*. The plaintiff can certainly blame no one for the loss of this money except himself." *Thompson v. C., S. F. & C. R. Co.* (Mo. March 2, 1892) 19 S. W. Rep. 77.

**Liability for Damages Where Land Taken is Transferred by Foreclosure Proceedings.**—In *Hartly v. Keokuk & N. W. R. Co.*, (Iowa May 23, 1892), 52 N. W. Rep. 352, a railroad company obtained contracts for the conveyance of a right of way along a certain line through a farm. Before the road was built the company's property was transferred by foreclosure proceedings to another company, which built its road through the farm, but for the most of the way on a different line. *Held*, that the railroad company was liable to the land owner for damages for the land taken. The court said: "Defendant claims to be the owner of the right of way by virtue of agreements and proceedings as follows: In the year 1870, T. C. Hartley & Bros. signed an agreement of which the following is a copy: 'In consideration of \$300, paid by canceling the subscription to said railway company, the receipt whereof is hereby acknowledged, we do agree to convey to the Keokuk and Minnesota Railway Company the right of way, not exceeding 66 feet in width, through the northeast quarter section 12, southeast quarter section 1, northwest quarter northeast quarter section 1, all in township 69, range 7, Lee county, Iowa, provided the line is located north and south across said northeast quarter section 12, starting from where the line now crosses the south line of said quarter section; the same to be deeded to the aforesaid company on demand after said road shall have been built through said land. Witness our names this 16th day of August, 1870. T. C. HARTLEY & BROS. Signed in the presence of WM. TIMBERMAN.' 'Said railway company to furnish said Hartley & Bros. fencing boards and posts enough to make a strong fence along the line of said railway across the southeast quarter of section 1

within one month after the track is laid; said Hartley & Bros. to furnish the nails and put up the fence without cost to said railway company.' At about the same time Rachel Bunker, who it appears claimed title to a part of the land in question, signed an agreement as follows: 'In consideration of \$50, I do agree to convey to the Keokuk and Minnesota Railway Company the right of way, not exceeding 66 feet in width, through the south half of northeast quarter of section 1, township 69, range 7, Lee county, Iowa; the \$50 to be paid when the first passenger train passes over the land; the same to be deeded to the aforesaid company on demand after said road shall have been built through said land, and not until the \$50 is paid. Witness my name this 2d day of August, 1870. RACHEL BUNKER. Signed in presence of GUY WELLS.'

"The Keokuk & Minnesota Railway Company located the line of its proposed railway over the land in question, and in 1870 it did some grading on that line. In August, 1876, the Keokuk & Minnesota Railway Construction Company filed in the office of the district court of Lee county a statement for a mechanic's lien on the property of the Keokuk & Minnesota Railway Company, including its right of way. In March, 1878, the lien of the construction company was foreclosed, the decree describing the right of way as 'a strip or belt of land from 66 to 100 feet wide, as the same is located or marked,' to the north line of Lee county. Special execution issued on the decree, and the property therein described was sold to William Timberman, trustee, in May, 1878. Proceedings were afterwards had in probate in the circuit court of Lee county in the matter of the estate of William Timberman, deceased, in which an order was made substituting Guy Wells in place of Timberman as 'trustee for the strip of land from sixty-six feet to one hundred feet in width, from Keokuk to the north line of Lee county, Iowa, as located by the Keokuk & Minnesota Railway Company.' In July, 1880, Wells, as trustee, executed to defendant a deed for the strip of land 'as the same is located, staked out, and worked \* \* \* on the line located and established by the Keokuk & Minnesota Railway Company.' In June, 1880, the defendant instituted proceedings for the assessment of the compensation for the right of way in question. Damages were assessed in that proceeding in favor of members of the construction company, but none of the Hartleys were made parties to it. The theory of the defendant is that the Keokuk & Minnesota Railway Company had acquired title to the right of way which was transferred to defendant by means of the decree and sale in the foreclosure proceedings and the assessment proceeding of 1880, and that compensation for the right of way has once been paid to the land owners, and cannot again be recovered.

"The appellees contend that the interest of the Keokuk & Minnesota Railway Company in its right of way was not sufficient to support a mechanic's lien; that whatever interest it had reverted to the owners of the land for failure to use the right of way for a period of more than eight years; and that defendant's proceeding of 1880 was ineffectual to divest the owners of title because they were not made parties to it. It is also insisted that the probate court had no power to substitute Wells for Timberman as trustee. The agreement signed by T. C. Hartley & Bro. recites a consideration of \$300, paid by canceling a subscription to the Keokuk & Minnesota Railway Company. It provided for the delivery of a deed on demand after the road of that company should be built on a line which was in part designated. The road specified was never built, and it does not appear that the road of defendant was constructed on the line contemplated in the agreement. On the contrary, it is clearly shown that the road of defendant runs for more than one and three-fourths miles through the land of plaintiffs; that it follows the line of the old company

for about half a mile, and that for the remainder of the distance it is on a wholly different location, most of which is nearly one-fourth of a mile from the former one. It thus appears that, if any interest in a right of way was conveyed by means of the foreclosure proceedings,—a question we do not find it necessary to determine,—it was not an interest in at least five-sevenths of the right of way in controversy, and defendant has failed to show that there was any conveyance of an interest in the remaining two-sevenths, for it is not shown that any part of its line is located where the contract of T. C. Hartley & Bro. required a portion of the road to which it referred to be built. There is no pretense that the \$50 specified in the contract of Rachel Bunker has been paid, and we conclude that defendant has wholly failed to show that the Keokuk & Minnesota Railway Company ever acquired an interest in the right of way now in controversy, or to show that compensation therefor has ever been paid to the owners of the land. It follows that defendant has failed to show that it acquired any interest adverse to plaintiff by virtue of the conveyance of Wells, or by its assessment proceeding of 1880."

**Guardian's Right to Agree as to Damages to Infant's Land.**—In *Louisville N. O. & T. R. Co. v. Blythe*, (Miss., May 23, 1892,) 11 So. Rep. 111, it appeared that the charter of a railroad company provided, among other things, that in condemnation proceedings to acquire a right of way, when land to be taken for that purpose belongs to an infant having a resident guardian, such guardian might agree with the company on an "amount of damages to be paid for taking such lands or release to such company his claim or right to damages in the premises." *Held*, that such agreement may be made without previous ascertainment of the value of the property by condemnation proceedings. And *held*, further, that such charter was not in conflict with the constitution of the state conferring on the chancery court control over the property of minors; said charter being the exercise not of judicial, but of legislative powers only. The court said: "It is argued in behalf of the appellees that the guardian could convey under the authority of the last clause of the second section of the Act of March 9, 1882, only after there had been a condemnation of the property and an ascertainment of its value as provided in the preceding clauses of the section. This view is not a correct construction of the statute, which authorized the guardian to agree with the company upon the amount of damages, or release all claim to damages. Evidently this was intended as a distinct mode by which the company could acquire the right of way, and its purpose and effect were to dispense with the necessity for condemnation proceedings in this class of cases. The discretionary power was confided to the guardian, of adjusting the damages with the railroad company, as was also the authority to decide whether it would be beneficial to the ward's estate to convey the right of way, without any pecuniary or direct compensation or consideration. This, precisely, as in case of a person *sui juris*, obviated the necessity for any condemnation proceedings. The more important question presented in this case is whether it was beyond the limits of legislative power for the legislature to confer upon guardians the authority to convey the right of way in the lands of their wards, as provided in the section of the Act of March 9, 1882. The objections urged against the validity of this statute are that it is a legislative usurpation of judicial power, full jurisdiction in minors' business having been confided by the constitution to the courts of chancery; that it provides no notice to the minor, who is the owner of the land, and therefore the method provided by this statute, for taking private property for public use, is not 'due process of law' and, finally, that it dedicates private property to public use without due compensation first being made to the minor. These objections will be examined in the order stated.

"The doctrine is firmly established by the great weight of American decisions, and sustained by the most cogent and unanswerable reasoning, that special acts of the legislature, authorizing or confirming the sale of lands by guardians, are constitutional when their object is simply to provide a change of investment, and not to divest the beneficiary of property rights, in the absence of special or exceptional constitutional limitation, and that such acts are not judicial, but the proper exercise of legislative power.

"Such a power necessarily resides in the legislative department of the government, as *parens patriæ*, to prescribe such rules and regulations as may be proper for the management, superintendence, and disposition of the property of infants, lunatics, and persons who are incapable of managing their own affairs. This principle was announced by Judge STORY, who delivered the opinion of the supreme court of the United States in *Wilson v. Leland*, 2 Pet. (U. S.) 660, a decision that was followed in the case of *Watkins v. Holman's Lessee*, 16 Pet. (U. S.) 25, and also in *Hoyt v. Sprague*, 103 U. S. 613. In *Hoyt v. Sprague*, Mr. Justice BRADLEY, delivering the opinion of the court, speaking of this class of statutes, said: 'The passage of such laws is not the exercise of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. But, when it is not confided to the courts, the power exercised is of a legislative character, the legislature making a law for the particular case.' Such has been the uniform course of decisions in this state. *Williamson v. Williamson*, 3 Smed. & M. (Miss.) 715, 747, was followed and affirmed in *McComb v. Gilkey*, 29 Miss. 146, and again in *Boon v. Bowers*, 30 Miss. 246. The three cases cited by counsel for the appellees do not controvert the correctness of the principle as we have stated it. The statute involved in the Illinois case of *Lane v. Dorman*, 3 Scam. (Ill.) 238, expressly adjudicated a debt in favor of a particular creditor, and directed a sale of the minor's lands for its payment. The court characterized the statute for this reason as in the nature of a judicial decree. In the Pennsylvania case of *Shoenberger v. School Directors*, 32 Pa. St. 34, the statute before the court directed the sale, by two strangers, of land that had been devised to the testator's widow for life, with power of appointment by last will and testament to such persons as she might appoint, with remainder over to various specified persons, some of whom were minors. The court said the statute 'was simply an authority to strangers to seize and sell an estate under no obligation or necessity to be sold. It was a legislative repeal of a private citizen's will.'

"*Jones v. Perry*, 10 Yerg. (Tenn.) 59, a Tennessee decision, proceeded on the construction of a special statute which the court interpreted to adjudicate and determine the question of the debts for which the land was directed to be sold, and accordingly held the statute unconstitutional on the ground that it was in this respect the exercise of judicial power. It will be seen that *Jones v. Perry* stands apart from the general constitutional doctrine, and rests alone upon the construction of the particular statute then being considered. An opinion given by the judges of the supreme court of New Hampshire to the legislature of that state, reported in the fourth volume of New Hampshire Reports, page 564, stands alone and unsupported in its broad and unconditional denial of power in the legislature in this class of cases. The constitution of Mississippi, it is true, invests the chancery courts with full jurisdiction in minors' business; but, having ascertained that the special power exercised in this class of statutes is legislative and not judicial, it is evident that the legislature has not usurped in any respect the powers or functions of the judicial department of the government. So the former



constitution of 1832 gave the probate courts jurisdiction in all matters testamentary and of administration and in orphans' business, but by a long line of decisions it was held that the power of these courts over the lands of decedents and infants was derived from legislative grant, and was therefore purely statutory, and not constitutional.

"The power of determining controversies, of adjudicating debts, and deciding questions of property and personal rights is purely judicial, but the delegation of the power of selling lands for the payment of debts that are to be ascertained and adjudicated by the courts is not, in any sense, a judicial act, but the exercise of legislative power. The statute now under consideration contains two distinct features. It confers upon the guardian authority to agree upon the compensation for the ward's lands to be taken as the right of way, and also the authority to release all claim to damages and compensation. In this case the deed was made upon an independent and valuable consideration, contained in the condition subsequent in the deed and running with the grant, that the railroad company should erect and maintain a depot and station on the land, a condition which has been performed. The deed is not voluntary and without consideration, but, on the contrary, its consideration may be of greater value than a money compensation for the strip of land taken as a right of way. The adult co-tenants evidently regarded it as of equal value to the land conveyed to the railroad company, and it can readily be perceived that such a consideration may not only be ample compensation for the right of way granted, but in many instances might far exceed the money value of the land granted to the railroad company as a roadway. A conveyance on such a consideration is in no just or proper sense the dedication of private property to public use without compensation. The railroad company has stipulated to maintain this depot on the land conveyed by these owners, partly for their profit and convenience in receiving their supplies and shipping their crops, a full equivalent for the right of way. This condition is not only a valuable, but a continuing one, and, upon its failure, the land granted will revert to the grantors at their option, according to their original title.

"If the legislature has the power to authorize a guardian to sell the lands of his ward for the payment of debts or the re-investment of the proceeds, the power must exist to authorize a guardian to sell a part of his ward's plantation as a right of way for the consideration of the erection and maintenance of a railroad station on the land, which in actual value is a fair compensation for the land conveyed, and which will be to the benefit, and not to the injury, of the infant owner. There is no deprivation of property in such a case, but the conversion of its value from one form into another. Such an arrangement amounts to direct compensation, not in money, but its equivalent, and the power wisely exercised, as it seems to have been in this case, would be to the interest of the minor." *Louisville N. O. & T. R. Co. v. Blythe*, (Miss., May 23, 1892,) 11 So. Rep. 111.

**Trustee as the Proper Party to the Proceeding to Condemn Trust Property.**—In condemnation proceedings to subject trust property to public use in the exercise of the right of eminent domain, the trustee is the proper party to represent the trust estate, and it is not necessary that the beneficiaries should be parties to the proceeding. *Small v. Georgia Southern & F. R. Co.*, 87 Ga. 602.

**Rights of Vendor and Vendee of Land Condemned by Railroad.**—In *For-dyce v. Wolfe*, 82 Tex. 239, a railroad company began condemnation proceedings for a right of way over plaintiff's land. A few months after the proceedings were instituted plaintiff sold the land by an absolute deed, subsequently condemnation proceedings were dismissed. Plaintiff then

brought suit for damages for the construction of the road across this land, making his vendee a party defendant. The company filed a plea asking that the land be condemned. *Held*, that plaintiff was entitled to compensation for the injury to the land resulting from the construction of the road and for the use of the land occupied by the company up to the date of the sale by plaintiff, and that plaintiff's vendee was entitled to compensation for the value of the land taken and for any such decrease in value of the remaining land that might have resulted had the company acquired a permanent right of way. The court said: "This suit was brought by appellee to recover of appellants Fordyce and Swanson, as receivers of the St. Louis, Arkansas & Texas Railway Company, damages for the construction of a railway by the railroad company across a tract of land. He sought compensation for the land appropriated for the right of way, and also for damages to the remainder of the tract. The plaintiff was the owner of the land at the time the railroad was constructed, but had sold it to appellant Measles before the bringing of this suit. He made Measles a party defendant, alleging that when he sold and conveyed the land to the latter he reserved his claim for damages against the railroad company. The receivers prayed for a condemnation of the land for railroad purposes, and asked that the damages should be assessed in the action. The defendant Measles pleaded, alleging his purchase of the land before the bringing of the suit, and prayed for a judgment in his favor for all the damages resulting both for the trespass and condemnation. The judgment of the court, however, was that the plaintiff should recover of the receivers, not only the damages to the tract for the construction of the road, but also compensation for the land condemned, and that defendant Measles should take nothing by reason of his plea in reconvention. Both the receivers and Measles appeal from the judgment. The receivers complain only that the damages allowed are excessive; but, since the judgment will be reversed upon another ground, it is unnecessary, if not improper, to pass upon that question. Appellant Measles insists that the court erred in not rendering judgment in his favor for the damages not only for the land taken, but also for the damages resulting to the remainder of the tract from the construction of the railroad. The facts bearing upon this question are that the railroad company constructed their road across the land in question some time in the spring or summer of 1887; and in June or July of that year instituted proceedings to condemn the right of way over it. In November of the same year appellee sold and conveyed the entire tract to appellant Measles by a general warranty deed, which described it by metes and bounds, and which contained no exception or reservation whatever. In January, 1889, the condemnation proceedings were dismissed. In July, 1889, the present suit was brought. Section 17 of article 1 of our constitution provides, in effect, that no person's property shall be taken for a public use without adequate compensation being made; and it follows, therefore, that the title to property which is attempted to be appropriated for such purpose does not pass until the compensation has been paid or secured. If proceedings instituted against the appellee for the condemnation of the land had resulted in a final decree assessing the damages, and the damages had been paid, the appellant Measles, as a purchaser *pendente lite*, would, as to the railroad company at least, have been concluded thereby. But, this proceeding having been dismissed, we are of opinion that the rights of the parties to this suit were in no manner affected by it; and that this case is to be treated as if no such action had ever been instituted. At the time, therefore, when appellee conveyed the land to Measles, the railroad company was a mere trespasser, and appellee's title was unimpaired by its entry upon and use of its right of way. He had, however, right of action against it for such damages as resulted from its

trespass. It is clear, we think, that by his warranty deed all his title to the land passed to Measles; and it is equally clear that this right of action to recover the damages for the mere trespass did not pass. For the latter he had a right of action, and it was not affected by his conveyance to his vendee. The measure of his damages was the injury to the land which resulted from the mere construction of the railroad, and compensation for the use of so much of the land as was occupied by the company from the time of the entry until the date of his conveyance to Measles. In the case of *San Antonio & A. P. R. Co. v. Ruby*, 80 Tex. 172, this court held that in a proceeding for the condemnation of land for a railroad the time of the 'taking' within the meaning of the constitution was the time of the trial. Having then acquired an absolute title to the entire tract of land, free from any easement or incumbrance by reason of the trespass of the railroad company, Measles, when the appellant receivers filed their plea in reconvention for the condemnation of its right of way, became entitled to recover all the damages incident to that proceeding. These do not embrace the injury which had resulted to the land from the construction of the railroad at the time it was conveyed to him, but do include the value of the land taken, as well as any such deterioration in the value of the remainder of the tract as may have resulted from the fact that the railway company had acquired the right to permanently hold the right of way, and to use it for the purposes of operating a railroad. However, he is not entitled to recover for any damage done to the land before he bought it, and therefore his damages should be assessed with reference to the condition of the property at the time of his purchase. He is not entitled to recover for changes in the surface of the land, resulting from the construction of the road, but is entitled to recover for any depreciation in its value that may have resulted from the right acquired by the condemnation to permanently maintain the road across the tract. Appellee and appellant Measles are entitled to recover sums which, added together, will equal the amount the appellee would have been entitled to recover had he never conveyed, and no more; and care should be taken that the receivers be not subjected to a double recovery. There was error in adjudging that the appellee should recover the entire damages and that Measles should take nothing, and therefore the judgment is reversed, and the cause remanded."

**Taking Leasehold Premises—Action by Lessee and Others—Defense.**—In *Ehret v. Schuylkill River East Side R. Co.* (Pa. Oct. 3, 1892) 24 Atl. Rep. 1068, E. and others brought an action against a railroad company for damages to a leasehold by taking a part of the premises for railroad purposes. Held that the railroad company could not set up the defense that the lease was made to E. alone, and was not transferable without the lessor's consent and that the lessor had not consented to any transfer. The court said: "It does not appear that any question of title in plaintiffs to the lease, machinery, etc., or want of proper parties to the proceeding, arose until a motion for nonsuit was made. The cause was carefully and ably tried, and in a clear and comprehensive charge, calling attention of the jury to the facts and circumstances presented by the evidence and questions of law applicable thereto, etc., it was fairly submitted to the jury. Several points for charge were presented by defendant company, all of which, except the two recited in the eighth and ninth specifications of error, were withdrawn. These two points, after referring to the fact that the lease of the lot was to Michael Ehret, Jr., alone, that it contains a clause against subletting without consent of the lessor, etc., and averring that no consent to subletting or transfer to the other plaintiffs has been shown, etc., request the court to charge that the verdict must be for defendant. Both of these points were rightly refused. The covenant against subletting or assigning was for the benefit of the city. In the absence of

any evidence that the city authorities objected to its lessee associating others with himself in the business contemplated by the lease, the defendant company has no just reason to object. It cannot be prejudiced by having two others joined with the lessor as plaintiffs. Moreover, the bald technical objection, grounded on alleged want of proper parties, came too late. It should have been raised, if at all, *in limine* when the petition for appointment of viewers was presented, or, at the very latest, when the issue was framed by the court."

**Compensation to Prima Facie Owners of Land Condemned.**—A devise of the testator's home place to A. and B. and their heirs forever, followed immediately by these words: "It is my will and desire that the said A. and B. shall enjoy and own my home place equally and jointly, and at their death to go to their heirs,"—construed in the light of the parol evidence submitted in this case, vests a fee simple title in A. and B., the testator having died in 1888, and consequently the provisions of the Code being applicable. The judge did not err in granting a temporary injunction restraining the railroad company from appropriating, under the right of eminent domain, a portion of the lands included in said devise, without first making compensation to the *prima facie* owners of said land. The court said: "The only question in this case is the proper construction of the third item of the will. It reads as follows: 'Item 3. I give, will, and bequeath to my nephews Cicero S. Archer and Livingstone H. Weir my home place where I now reside, together with all the rights, members, and appurtenances thereunto appertaining or belonging; to belong to them, the said Cicero S. Archer and Livingstone H. Weir, and their heirs, forever. It is my will and desire that the said Cicero S. Archer and Livingstone H. Weir shall enjoy and own my said home place equally and jointly, and at their death to go to their heirs.' In the construction of wills, the great thing to be sought for is the intention of the testator. If the intention is not clearly expressed, if it is obscure or ambiguous, Code, 2457, declares that 'the court may hear parol evidence of the circumstances surrounding the testator at the time of its execution, and may hear parol evidence to explain all ambiguities, both latent and patent.' Under this section, the court below, in construing this item, heard parol testimony as to the intention of the testator and his surroundings at the time of the execution of the will. That testimony shows, in substance, that the testator was a man advanced in years, with no immediate family, and that he had never married; that he desired to make a final disposition of all his property; that he had a number of brothers and sisters and nieces and nephews; that as to a certain number of them he entertained no kindly feelings, and had nothing to do with them; that Cicero Archer and Livingstone Weir were his favorite nephews, and lived about half of the time with him; that they were both middle-aged men, and had never married, and were not likely to marry; that Livingstone Weir was a paralytic, and incapable of marriage, and that the testator knew this; and that he stated, at or about the time of the execution of the will, that he did not desire those of his kindred with whom he was unfriendly to have any of his property. The property bequeathed to these favorite nephews by the item above quoted constitutes the bulk of the estate. The fourth item gives to the same nephews all of his personal property, and the fifth item gives to six other nephews 330 acres of land. The testator died in 1888. Construing these items of the will in the light of the facts now before us, we think it vested a fee-simple title in Cicero Archer and Livingstone Weir. The court, therefore, did not err in granting a temporary injunction restraining the railroad company from appropriating, under the right of eminent domain, a portion of the lands included in the third item of the will, without first making compensation to the *prima facie* owners

thereof. This decision, of course, applies only to the parties now before the court. If other parties should be made to the case hereafter, the latter would not be bound thereby; or if upon the trial of the case the facts should be materially different from the facts now before us, as to the intention and surroundings, of the testator at the time of the execution of the will, our construction of the will would perhaps be different." *Georgia C. & N. R. Co. v. Archer*, 87 Ga. 237.

**Effect of Election by Minor to Disaffirm Conveyance of Land Made Prior to the Taking.**—In proceedings to condemn land, one H. was permitted to file a petition alleging that before the proceedings she was owner of one of the lots sought to be taken, and conveyed the same to defendant's grantor; that at the time of the conveyance she was a minor, and that she had elected to disaffirm the conveyance; and praying that the damages assessed for the taking of such lot be paid to her, less the consideration received by her at the time she conveyed the lot. The court ordered the entire compensation assessed for both lots to be paid to defendant. *Held*, that as to H. the judgment was a final one from which a writ of error would lie. The court said: "It is the policy of the law to settle once for all, so far as possible, in the condemnation proceedings the amount of damages resulting from the taking. The statute expressly provides that the commissioners shall fix the compensation to be paid, not only to the owners, but to all parties interested in the lands taken, as well as all damages accruing to such owners or parties interested in consequence of the condemnation of the same. See Eminent Domain Act, § 6. In *Crane v. City of Elizabeth*, 36 N. J. Eq. 339, the court had under consideration a statute, if anything, less comprehensive than the statute of this state, in that it required compensation to be made only to the 'owner or owners of lands and real estate taken for the improvement;' and yet in that case it was decided 'that the compensation is to include the value of all the interests burdened by the public easement, and is to be paid to the owner of the land if no other claimant intervenes, and, if in any such case such owner ought not, in equity, to receive the whole, timely resort must be had to the court of chancery, which will see to the equitable distribution of the fund.' It was said in the course of the opinion, that the proceedings were in the nature of a proceeding *in rem*,—a taking, not of the rights of designated persons, but of the thing itself; and if in any case the designated owner of the land is not entitled to receive the fund, equity will, at the instance of any interested complainant, direct its proper distribution. Under our statute, we think the relief may be granted in the original action upon a proper showing. In no other way can the provision requiring the rights of the interpleader to be fully considered and determined be carried out. In the case at bar, petitioner did intervene in the court below, and in her petition shows that she has an interest which ought to be protected. The statute allows the interests of minors to be taken by virtue of the proceedings. The fact that the record title was in plaintiff in error may have relieved the railroad company from making plaintiff in error a party defendant in the first instance, but, she having voluntarily appeared, the action of the court below entirely ignoring her claim cannot be sustained. In the case of *Chandler v. Jamaica Pond Aqueduct Corp.*, 125 Mass. 544, relied upon by defendant in error, one Ward granted the Aqueduct Corporation the privilege of laying logs and wooden pipes on his land, in consideration whereof, and for five dollars in money paid by Ward, the company, in turn, deeded to him certain other lands, 'to have and to hold the same to the said Ward, his heirs and assigns, as long as said corporation shall keep pipes in his land as aforesaid and no longer.' Afterwards the title acquired by Ward passed to Chandler. Thereafter the corporation instituted proceedings for the

purpose of having the same land condemned for its uses, and upon the trial, claimed that by the Ward deed, which, as we have seen, was a part of Chandler's claim of title, only a base fee was conveyed, and that the company had a right to rely upon this fact in reduction of damages. The court, however, decided against such claim, upon the ground that the possibility of such interest was too remote and contingent to be the subject of an estimate of damages by a jury, and could not be allowed. It was further held that the owners of the fee had the right to recover the entire value of the land, even if a part of it was held by them under the Ward deed, and they had only a base or determinable fee in it. So in this case, as we understand counsel, the claim is that, notwithstanding the voidability of the deed made by intervenor, the grantee is entitled to full compensation for the land condemned. This would have the effect of entirely cutting off the right of plaintiff in error to revoke the deed made during her minority, a result we cannot entertain. Although it may be that a minor cannot avoid his deed during the continuance of his minority, he may, nevertheless, enter upon the deeded premises, and receive the rents and profits thereof until he arrives at an age when he has the capacity to affirm or disaffirm the deed at his election, or the infant may, by his guardian or next friend procure the appointment of a receiver for the purpose of collecting the rents and profits of the premises. *Mathewson v. Johnson*, Hoff. Ch. (N. Y.) 560; *Bool v. Mix*, 17 Wend. (N. Y.) 132; 1 Washb. Real Prop. \*306; *Edgerton v. Wolf*, 6 Gray, (Mass.) 453; *Chandler v. Simmons*, 97 Mass. 508.

"The right of entry was a present existing right in petitioner at the time the petition in intervention was filed. In this respect the case is dissimilar from the case of *Chandler v. Jamaica Pond Aqueduct Corp.*, *supra*. The filing of the petition should have been taken as an election on the part of plaintiff in error to assert such right. And, under the statute, it should have been 'fully considered and determined,' and it was error to enter final judgment awarding the fund to the defendant, while the plea of intervenor was undisposed of. As we have seen, courts should be vigilant in protecting the rights of minors; and if the court below had been of the opinion that it was necessary for plaintiff in error to resort to an equitable action to enforce her rights, it should have preserved the fund until her rights could have been adjudicated in such action. But we cannot think such an action necessary. Ample power seems to have been given the court in the condemnation proceedings, and the fact that she was still a minor at the time of the trial did not justify the court in passing over her petition in silence, and awarding the entire fund to defendant in error. The judgment directing the fund to be paid to defendant in error, is accordingly reversed, with directions in the court below to proceed in accordance with the views expressed in the opinion. Under our statute, plaintiff in error reached her majority a few months after the trial in the district court. *Jackson v. Allen*, 4 Colo. 263. The disabilities under which she was laboring at the time of the trial no longer existing, we apprehend the court below will find no difficulty in fully determining the rights of the parties." *Hutchinson v. McLaughlin*, 15 Colo. 492.

**Death of Land Owner—To Whom Right of Action Descends.**—Upon the death of the owner of land condemned after the right of action accrues, such right is a chose in action recoverable by his administrator, and does not descend to his heir. *Harshbarger et al. v. Midland R. Co.* (Ind. April 20, 1892), 30 N. E. Rep. 1083.

**Where Compensation Paid to Life Tenant.**—Although under C. S. C. chap. 66, sec. 11, as amended by 24 Vic. chap. 17, sec. 1, a railway company could obtain a good title in fee simple to expropriated lands by a conveyance from the tenant for life thereof, they were not justified in paying the

compensation money to the tenant for life; and where such payment was made in 1871 the company were ordered to pay the amount over again to the persons entitled in remainder whose title accrued within six years of the time of bringing the action. *Young v. Midland R. Co.*, 19 Ont. App. Rep. 265.

**Disposition of Amount Awarded and Paid Into Court Cannot be Disputed by Railroad Company.**—Where a railroad company has instituted condemnation proceedings for a right of way over certain lands, and has paid into court for the owner the amount awarded therefor, it cannot, when ordered to show cause why the funds should not be paid to a certain person claiming to be the owner, contend that it was entitled to the right of way over said lands under its grant of right of way over public lands. *Northern Pac. R. Co. v. Jackman* (Dakota, May term, 1889), 50 N. W. Rep. 123.

## SHORTLE *et al.*

v.

## TERRE HAUTE & INDIANAPOLIS R. CO.

(*Indiana Supreme Court, April 21, 1892.*)

**Eminent Domain—Action for Damages—Limitations.**—In a petition for a writ to assess damages occasioned by the construction of a railroad under Rev. St. Ind., 1881, §§ 905-912, which declares that the owner of land taken by a railroad for right of way "may have a writ for the assessment of damages," the proceedings are governed by section 294, which provides that "all actions not limited by any other statute shall be brought within fifteen years," and not by section 292, which provides that actions for injuries to property shall be brought within six years.

**Action by Several Plaintiffs—Conveyance by Some.**—Where several persons bring an action for damages against a railroad company for taking land for a right of way, and one or more of the plaintiffs have conveyed the land in suit, their action does not bar the right of action of those who have not conveyed.

**Conveyance of Right of Way—Agreement to Fence—Consideration.**—Railroad companies are required by law to fence their right of way, and where a right of way is conveyed to a railroad company upon the promise by the company to fence the same, the grant is without consideration and the grantor may subsequently have his damages assessed.

**Action by Remainder-man—Statute of Limitations.**—Under Rev. St. Ind., 1881, § 287, which declares that a remainder-man may sue for an injury to the inheritance, even though there be an intervening estate for life or years, the statute of limitations will run against an action by a remainder-man against a railroad for damages in taking land for a right of way, notwithstanding the existence of a life estate.

APPEAL from Tippecanoe Circuit Court.

Petition for writ to assess damages.

*James V. Kent*, for appellants.

*John F. McHugh*, for appellee.

COFFEY, J.—This was a petition by the appellants for a writ to assess the damages occasioned by the construction of a railroad over their lands, under the provisions of sections 905–912, Rev. St., 1881. The appellee answered: “*Second*, six years’ statute of limitations, [Rev. St., 1881, § 292;] *third*, fifteen years’ statute of limitations, [*Id.* § 294; *fourth*, conveyance of the right of way by part of the appellants; *fifth*, entry upon and occupancy of the right of way in controversy with the consent of the appellants, and an agreement on the part of the appellants to convey such right of way in consideration of appellee’s agreement to fence the same, covering compliance by the appellee on its part.” The court overruled a demurrer to these several answers, and thereupon the appellants replied to the second and third paragraphs that there was an intervening life estate on the land at the time the appellee and its predecessors entered, and that the period fixed by the statute of limitations had not elapsed since the termination of such life estate. To this reply the court sustained a demurrer, and the appellee had judgment for costs. Case stated.

The assignment of error calls in question the rulings of the court in overruling a demurrer to the several answers above referred to, and in sustaining a demurrer to the reply filed by the appellants to second and third paragraphs of such answer. This application was not barred by the six years’ statute of limitations and the court therefore erred in overruling the demurrer of the appellants to the second paragraph of the appellee’s answer. Statute of limitations. Shortle v. Louisville, N. A. & C. R. Co., (Ind. Sup.) 30 N. E. Rep. 639. That there is a broad distinction between an application of the kind we are now considering and an ordinary action of trespass is almost too plain for argument. At the termination of an action of trespass the title to the land is left where it was when the action was commenced. In an action of trespass the owner does not recover the value of the land appropriated, for the reason that he still retains it. In an action of this kind, where a writ issues to assess the damages, the title to the land appropriated is transferred to the railroad company, and the owner recovers its value. The distinction between the two classes of cases is fairly illustrated in the case of McClinton v. Pittsburg, Ft. W. & C. R. Co., 66 Pa. St. 404, in which the court said: “The petition, when properly used, is not for the recovery of past damages under an unlawful entry, but for compensation for a right to be invested in the company. Though the latter is often denominated ‘damages,’ its subject is essentially different from the former. It is called ‘damages’ only in



the sense of unliquidated demand, but in its nature it is the price of a purchased privilege."

The court did not err in overruling the demurrer to the third paragraph of the answer. This proceeding is limited by the 15 years' statute of limitations. There is no other statute by which it can be limited. *Shortle v. Louisville, N. A. & C. R. Co.*, *supra*; section 3954, Rev. St. 1881, does not purport to be a statute of limitations, and does not, in our opinion, have any application to the question now under consideration.

The court erred, we think, in overruling a demurrer to the fourth paragraph of the answer. It is pleaded as a bar to the entire application. The fact that some of the appellants have conveyed the right of way is no bar to the right of those who have not done so to have their damages assessed. An answer which is pleaded in bar of the whole action and bars only a part is bad on demurrer. *Pouder v. Tate*, 76 Ind. 1; *Falmouth, & L. Turnpike Co. v. Shawhan*, 107 Ind. 47; *Reid v. Huston*, 55 Ind. 173.

The court erred, also, we think, in overruling a demurrer to the fifth paragraph of the answer. The facts therein set forth fall far short of constituting an estoppel against the appellants. It furthermore appears upon the face of the answer that the promise of the appellants to convey the right of way was without consideration. The duty to fence its road was a duty imposed upon the appellee by law, and a promise to perform that duty was no consideration for an agreement on the part of the appellants. *Ford v. Garner*, 15 Ind. 298; *Reynolds v. Nugent*, 25 Ind. 328; *Ritenour v. Mathews*, 42 Ind. 7; *Fensler v. Prather*, 43 Ind. 119; *Smith v. Boruff*, 75 Ind. 412.

The reply filed by the appellants was wholly insufficient to avoid the statute of limitations. The authorities cited by the appellants have no application here. They apply, ordinarily, to possessory actions. Under the facts disclosed by the pleadings in this case the appellants could not maintain an action of ejectment. Section 287, Rev. St. 1881, provides that "a person seized of an estate in remainder or reversion may maintain an action for waste or trespass, for injury to the inheritance, notwithstanding an intervening estate for life or years;" while section 909, under which this proceeding was instituted, provides that "any person having an interest in any land which has been or may be taken for any such public work, may have the benefit of this writ, upon his own application, as

Action by  
several  
plaintiffs.

Fencing  
right of  
way.

Action by  
remainder  
man.

above provided, upon which like proceedings shall be had as in the case of applications made by the corporation, company, or person prosecuting the work." It will thus be seen that by express statutory provision the intervening life estate in no wise interfered with the right of the appellants to the writ which they now seek. So far as we have been able to ascertain, the authorities agree that the remainder-man is entitled to the remedy which the appellants in this case are invoking, and the intervening life estate is no barrier to the exercise of the right to have his damages assessed. *Burbridge v. New Albany & S. R. Co.*, 9 Ind. 546; *Pierce R. R.*, p. 185; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 50 Mich. 470, 5 Am. & Eng. R. Cas. 389, note; *Lawson, Rights, Rem. & Pr.* § 3894. In our opinion, the court did not err in sustaining the demurrer to the reply filed by the appellants.

Judgment reversed, with directions to sustain the demurrer of the appellants to the second, fourth, and fifth paragraphs of the answer of the appellee.

**Eminent Domain—Limitation of Proceedings to Recover Compensation.**—This subject is exhaustively considered in the note, 39 Am. & Eng. R. Cas. 60 *et seq.* See also, *Land v. Wilmington & W. R. Co.* (N. Car.) 47 *Id.* 161, note 164; *Midland R. Co. v. Smith* (Ind.) 44 *Id.* 222.

**Same—When Cause of Action Accrues.**—Where a railroad takes possession and grades a right of way, it is such an appropriation of the land as will give the owner of the land a right of action for damages at that time. *Harshbarger v. Midland R. Co.* (Ind., April 20, 1892) 30 N. E. Rep. 1083. The court said: "The appellee in this case took possession of the right of way previously fenced through the lands of Henry Myers, father of the appellant Mary M. Harshbarger, by purchase under a decree of foreclosure, as successor to the rights of the original company that took possession and graded the roadway. The damages accrued to Myers, and the right of action existed in his favor in his lifetime. It is the settled law of this state that such right of action is not transferred to a purchaser of the real estate by deed of conveyance, without a special assignment of the right of action for damages for the previous appropriation by a railroad company of a right of way. *Sherlock v. Louisville, N. A. & C. R. Co.*, 115 Ind. 23; *Evansville & T. H. R. Co. v. Nye*, 113 Ind. 223."

**Release of Right of Way—Effect of Agreement—Damages.**—Where plaintiff agreed to release to a railroad company a right of way across his land "the damages to be assessed when the road is located, and the amount of said damages to be paid in stock in said railroad, cost of fencing not included in damages, provided no damage is done my buildings, race, or water power." *Held*, that in an action against the company for damages caused by the construction of said railroad through plaintiff's lands, such proviso applied only to the mere cost of fencing, and not to the whole agreement. The court said: "The learned court below instructed the jury that the proviso at the end of the paper related to the whole agreement, and not merely to the cost of fencing, and therefore that, if the jury found that no damage was done to the plaintiff's buildings, race, or water power, they could find that the general damage done by taking the land was payable in stock; otherwise 'the damage would be in dollars and cents, to be paid in cash.' We cannot so read this paper. We can only

judge of its meaning by the plain reading of its words. In the photographic copy of the paper, as in the printed copy, the word 'cost' in the final sentence is the beginning of a new and independent sentence, dissociated from the one preceding, and it reads: 'Cost of fencing not included in damages, provided no damage is done my buildings, race or water power.' The clear meaning of these words is that the cost of fencing shall not be included in the damages, if no damage is done to the buildings, race, or water power, that is, if no damage is done to the buildings, race, or water power, no damage is to be allowed for the cost of fencing. This is the natural construction and meaning of the words. But the court below held that the cost of fencing was to be 'payable in money value,' and that the words, 'provided no damage is done my buildings, race, or water power,' did not relate to the cost of fencing, but did relate to the damages mentioned in the preceding sentence. That sentence is in these words, 'The damages to be assessed when the road is located, and the amount of said damages to be paid in stock in said railroad.' What damages? Manifestly the 'damages,' all the damages resulting from the location and construction of the railroad through the plaintiff's land. This appears by the preceding sentence, 'that I will release to the company which undertakes to construct such road the right of way of lawful width through my land in Orange township, Columbia County, Pa.' Immediately following is the provision for assessing the damages, in the sentence above quoted. Certainly the words 'the damages' in that sentence mean all the damages. There is no distinction between damages arising from the taking of the land and those which arise from injury to the buildings, race, or water power. But the plaintiff was willing to waive any claim to damages for cost of building fences, if no damage was done to his buildings, race, or water power, and says so in the final sentence. We are quite unable to read the paper in any other way than this, and hence find that the court was in error in the reading adopted in the charge." *Hoffman v. Bloomsburg & S. R. Co.*, 143 Pa. St. 503.

**Release of Damages Pending Suit—Refusal to Accept Award of Appraisers.**—Where a plaintiff agrees by contract under seal, pending a suit against a railroad company for injury to his land, that he will accept the valuation by two named appraisers and upon payment of the amount by defendant he will convey the land to it, releasing all claims for damages, he will not be allowed to repudiate his contract, by refusing to accept the appraisers' valuation, and proceeding to recover damages. The court said: "It is a perfectly lawful contract, which the parties were entirely competent to make. It was carried into effect by the appraisers having made the valuation in question, it was never revoked by the plaintiff, and the defendant tendered full compliance with its terms. Why was not the plaintiff bound to perform it on his part? It is contended by the learned counsel for the appellee that the only remedies available to the defendant under it would be by a bill for specific performance, or an action to recover damages for its breach, and that at most it can be considered as an accord and satisfaction, but void as a defense, because there was no satisfaction. But these propositions do not meet the question. The agreement is set up by the defendant to prevent the recovery of damages, in accordance with the terms of the agreement. Why is it not a defense? It is no answer to say that the defendant might have filed a bill for specific performance, or might have brought an action to recover damages for its breach. The defendant has done nothing of that kind. It has simply asked that the plaintiff shall be held to his contract. No bill for specific performance has been filed, and the rules which pertain to that kind of remedy have no place in the discussion. The same is true as to the action to recover damages for breach of the contract. No such action has

been brought, and the consideration of that subject is not pertinent. The question simply is, shall the plaintiff be permitted to recover damages for a consequential injury to his land, and also keep the land, when he agreed with the defendant that he would release the damages if the defendant would pay him for the land a price to be fixed by persons agreed upon, and the defendant has offered to pay the price and tendered the money for it? Why should he be permitted to do this in violation of his contract? There is nothing contrary to law in such a contract. In the case of *North & W. B. R. Co. v. Swank*, 105 Pa. St. 555, we sustained such a contract, and compelled the owner to abide by it, although it was not by any means so precise and specific as this one, and contained no express provision releasing damages, and although, also, in that case the land of the owner was taken, whereas here it is not. We held there that 'an agreement between a land owner and a railroad company to sell the latter a right of way across the premises of the former covers all damages, of whatsoever sort, suffered by the land owner,—all for which he is legally entitled to compensation.' In the present case there is an express provision in the contract that the payment of the price shall release 'all claims of every character that the owners could make.' It cannot be that the owner shall be permitted to refuse payment of the price, and then say, 'The price has not been paid, and therefore I am not bound.' Moreover, in this case no land is taken by the defendant. If the plaintiff chooses, he can keep his land,—all of it,—but it cannot be tolerated that he shall both keep his land and recover damages contrary to his agreement besides; and therefore it is that the refusal of the wife to join in the deed for the land is of no possible consequence. The only result of such refusal is that a conveyance of the land cannot be compelled without a tender of the whole price for a deed signed by the husband alone. But here there is no question of compelling a conveyance of the land. The defendant is not obliged to have such a conveyance in order to make out its defense. The only question is, shall the plaintiff keep his contract? We know of no reason why he should not. If he chooses to break his contract, and refuse to receive what he agreed he would receive for his land, with a release of his consequential damages, he can keep his land, but he cannot keep his land and recover the damages both. There is no question of accord and satisfaction in the case, and a discussion of that question is without relevancy." *Jones v. Pennsylvania R. Co.* (Pa., Oct. 5, 1891,) 22 Atl. Rep. 883.

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### LIEBERMAN

v.

### CHICAGO & SOUTH SIDE RAPID TRANSIT R. CO.

(*Illinois Supreme Court, March 24, 1892.*)

**Eminent Domain—Compensation—Inability of Parties to Agree.**—Where an issue to be tried is merely as to the amount of compensation, it is not necessary to offer evidence upon the trial before the jury in support of an allegation in a petition for condemnation that petitioner and defendant are unable to agree as to the compensation, for while by Rev. St. chap. 47, § 2, such allegation is a jurisdictional requirement, yet going to trial before a jury, without first submitting the preliminary issue as to the right to

institute the proceedings, is an admission that the suit was properly brought.

**Elevated Railroads—Incorporation—Statutes.**—Companies for the construction of elevated railroads may be organized under the act relating to the incorporation of railroad companies, notwithstanding the act, April 7, 1875, (Rev. St. 1891, chap. 32, § 68) authorizing the organization of companies for the purpose of constructing elevated ways or conveyors under the general incorporation law.

**Same—Right to Condemn Land.**—Act March 1, 1872, (2 Starr & C. Ann. St. 1907) provides for the incorporation of associations "for the purpose of constructing and operating any railroad in this state," and a corporation organized for the purpose of building a railroad between certain points has a right, by virtue of said act, to condemn land in the process of constructing an elevated railroad in a city.

**Amending Condemnation Petition—Date for Estimating Damages.**—Where an original petition for the condemnation of property has been several times amended simply for the purpose of giving a fuller and more certain description of the property, and not by way of substituting one parcel of land for another, said amendments cannot be held to be tantamount to the filing of a new petition so as to change the date in respect to which the compensation should be estimated, and the evidence as to the value of the property should be restricted to the date of the filing of the original petition.

**Stipulation of Railroad—Effect on Damages.**—Where an elevated railroad in condemnation proceedings stipulates that the road shall only carry passengers, that no soft coal shall be used, and that its motive power shall be equipped with the best modern devices to render it smokeless and noiseless, etc., such stipulations should be considered by the jury in assessing the damages.

#### APPEAL from Cook County Circuit Court.

Condemnation proceedings.

*Moses & Pam*, for appellant.

*E. J. Harkness, Cooper & Gurley, and Wm. Garnett, Jr., (John P. Wilson, of counsel,)* for appellee.

BAILEY, J.—This was a petition by the Chicago & South Side Rapid Transit Railroad Company to condemn certain lands, lying along the west side of and adjoining the alley running north and south between State street and Wabash avenue, Chicago. The petition embraced various parcels of land not in controversy here; Abraham Lieberman, one of the property owners whose lands were sought to be condemned, being the only appellant. Lieberman's property consists of a number of lots fronting on State street, between Fourteenth and Sixteenth streets, and running back to the alley, viz., lots having a frontage of about 69 feet, of which he is the owner in fee; also lots immediately adjoining the same on the south, having a frontage on State street of 127 feet, in which he has a leasehold interest under a lease expiring May 1, 1897; and also three other lots, having a frontage on State street of 60 feet, and lying

Statement of  
case.

south of the foregoing, and separated therefrom by an intervening lot 25 feet in width, and on which he has a leasehold interest as tenant from year to year. The strip of land sought to be taken from the rear of these lots adjoining the alley, for right of way, varies in width from 20 to 25 feet. At the time the petition was filed, Lieberman was, and for several years prior thereto had been, extensively engaged in the business of buying, selling, and dealing in old iron, and was occupying said lots for carrying on said business. He claims that the taking of said strip of land will leave the portion of his premises remaining wholly inadequate to the requirements of his business, and that he should be allowed as damages, in addition to the value of the land taken, the depreciation in the value of the land not taken, the cost of the removal of his business, machinery, fixtures, and stock in trade to another location, and compensation for the interruption of his business during such removal. The cause was tried by a jury, who, after having heard the evidence and viewed the premises, awarded certain sums of money to the owners and parties interested in the several pieces of land taken as compensation therefor, but in each case found that there were no damages to the portion of said lots not taken. The sum thus awarded for the parts of the lots which Lieberman owned in fee, taken for said right of way, was \$5,748.75. They also awarded him, for improvements, cost of removal, and damages to business on lands or lots owned or occupied by him, the sum of \$4,000. The court, after denying Lieberman's motion for a new trial, gave judgment in accordance with said verdict, and from that judgment he has appealed to this court.

It is strenuously urged that the compensation and damages are inadequate, and that for that reason a new trial should be awarded. As is not unusual in cases of this character, the opinions of the witnesses as to the value of the land taken, and as to the damages to the land not taken are widely divergent. The evidence adduced on behalf of the appellant, taken by itself, would doubtless have warranted a larger award; but, when all the evidence is considered together, we are unable to say that substantial justice has not been done. We shall not undertake the useless task of giving in this opinion an analysis of the evidence, but shall content ourselves with the general statement that we have examined it with care, and have been brought to the conclusion that it supports and warrants the verdict. A number of legal propositions are raised, which, so far as we deem them material, we shall proceed to notice.

At the trial before the jury, no evidence seems to have

been adduced in support of the averment of the petition that the petitioner was unable to agree with Lieberman and the other respondents as to the compensation to be paid them in respect to the property proposed to be taken; and it is urged that the absence of such evidence goes to the jurisdiction of the court, and that the motion by Lieberman's counsel, made at the close of the petitioner's evidence, to dismiss the petition for want of jurisdiction, should therefore have been sustained. It may be admitted that an averment, in the petition by a railway company to condemn land for right of way, either that the compensation to be paid for or in respect to the property sought to be appropriated or damaged for such purpose cannot be agreed upon by the parties interested, or that the owner of the property is incapable of consenting, or that his name or residence is unknown, or that he is a non-resident of the state, is, by the second section of the eminent domain law, made jurisdictional. Rev. St. chap. 47, § 1; *Reed v. Ohio & M. R. Co.*, 126 Ill. 48, 36 Am. & Eng. R. Cas. 234; *Chaplin v. Highway Com'rs*, 129 Ill. 651. But, while this is so, the question of the right of the petitioner to maintain its petition was not before the jury, and was a matter with which they had no concern. In condemnation cases the jury is impaneled merely to ascertain and report the just compensation to the owner of the property sought to be taken or damaged. This is apparent from the form of their oath as prescribed by section 8, and by the terms of their verdict as required by section 9, of the eminent domain law. The question of the right to condemn is preliminary, and is for the court, and must be determined in favor of the petitioner before the right to have a jury impaneled to fix the compensation can arise. The property owner has the undoubted right to controvert the petitioner's right to condemn, and when he does so the burden is thrown on the petitioner to maintain its right by proper proofs. But where the property owner fails to make such contest in any proper manner the right to condemn will be deemed to be admitted, leaving the amount of the compensation to be awarded as the only matter in controversy. Thus, in this case, Lieberman was at liberty to controvert the averment of the petition that the petitioner was unable to agree with him as to the compensation to be paid in respect to the property sought to be taken, and if he had done so the burden would have been thrown on the petitioner to prove said averment in order to establish its right to condemn; but the evidence on this question would have been addressed to the court, and the issue thus raised would have been one which, in the ordinary course of pro-

cedure, should have been determined before a jury could be called. This rule of practice was considered in *Ward v. Minnesota & N. W. R. Co.*, 119 Ill. 287, where, after verdict of the jury assessing compensation, it was objected that no evidence of the corporate existence of the petitioner had been adduced at the trial. In overruling that objection, we said: "No question is made as to the form or sufficiency of the petition, but it is objected no proof was made on the trial that petitioner was either a *de jure* or *de facto* corporation; and it is insisted that the omission to make such proof is fatal to the present condemnation judgment. \* \* \*

Defendant waived the making of such proof by going to trial on the merits of the controversy, without objection. Even if proof is required to be made of the formal allegations of the petition, such proof is addressed to the court, and not to the jury. Whether the petitioner in such cases is a corporation, and is authorized to exercise the right of eminent domain, is a question to be determined by the court, and with which the jury have no concern. It is a preliminary question; and if the land owner goes to trial on the merits, without requiring such proof to be made, it will be understood he waives the making of the proof, and admits the capacity in which the petitioner sues. The fact that no formal answer may be required to be made to the petition, under the practice that prevails in this state, would not prevent defendant from objecting that petitioner shall not proceed to ascertain the compensation to be paid until proof is made it is a corporation, either *de jure* or *de facto*, under the law, and as such is authorized to exercise the right of eminent domain. In this case defendant went to trial on the merits, without objection as to the right of petitioner to condemn his land for public purposes, and he will be held to have waived the necessity of making proof of such right." In the present case, not only was no objection made to the petitioner's proceeding to ascertain the compensation to be paid because of its not having established its right to condemn, but Lieberman's counsel came and entered their appearance in writing, and by the same instrument expressly requested a trial by jury as by law provided. They then took part, without objection, in the impaneling of the jury, and the submission to them of the question of fixing the amount of compensation to be paid their client, and contested that question on the merits. By so doing, they waived all contest as to the petitioner's right to condemn, and thereby impliedly admitted such right; and they cannot now be permitted, on being disappointed as to the amount of the jury's award, to retrace their steps, and contest questions which were clearly preliminary to a jury trial.

Admitting capacity to sue.



It is next contended that the court erred in admitting in evidence to the jury the petitioner's articles of incorporation, on the ground that the petition was filed to condemn land for the right of way for an elevated railroad, and that said articles of incorporation did not authorize the petitioner to build such a railroad. We might well apply to this objection, also, the answer made to the last preceding one. By going to trial before the jury without contesting the petitioner's right to condemn for the purposes set forth in the petition, the respondent admitted such right, and the admission in evidence of said articles of incorporation could have occasioned him no prejudice.

But we are of the opinion that said articles of incorporation are sufficient to authorize the petitioner to build an elevated railroad, and that they were properly admitted in evidence. Said articles of incorporation bear date January 4, 1888, and said incorporation seems to have been formed under and in pursuance of the act to provide for the incorporation of railroad companies approved March 1, 1872. 2 Starr & C. St. p. 1907. Said articles declare it to be the purpose of said corporation to construct a "railroad" from a point on the north line of Van Buren street, Chicago, to a point on the Indiana state line; but nothing is said as to whether the proposed "railroad" is to be an ordinary railroad, built upon the surface of the earth, or one to be built at an elevation above the surface. It is contended, therefore—*First*, that said articles, by their terms, apply only to a surface railroad; and, *secondly*, that the statute under which the incorporation was formed contemplates the organization of railroad companies only for the construction of ordinary surface railroads. To this view we are unable to assent. The first section of the act authorizes the organization of corporations "for the purpose of constructing and operating any railroad in this state," and said articles of incorporation provide for the construction of a "railroad" between two specified termini. We are able to perceive no reason why the word "railroad," as here used, should not be construed to apply to elevated railroads as well as to any others. While most railroads, for obvious reasons, are so constructed as to make their grade conform as nearly as practicable to that of the earth's surface, yet it is a fact, with which every one is familiar, that they are sometimes constructed wholly beneath the surface, and sometimes upon an elevation above the surface. It is also a matter of common knowledge that an ordinary surface railroad may and often does, in different parts of its line, run through tunnels excavated beneath the sur-

Act relat-  
ing to ele-  
vated rail-  
roads.

face, or upon structures so built as to elevate it above the surface. But it has never been supposed that, where they run beneath or above the surface, they are any the less entitled to the name of "railroads." Nor does the fact that a railroad is wholly underground or wholly raised above the surface make it any the less a railroad.

The term "railroad," as used in the act of 1872, is clearly broad enough to include an elevated railroad; and we think the legislature clearly intended to use the word in a sense sufficiently broad and general to include railroads of that character. The same word, when used in the petitioner's articles of incorporation, must be deemed to be used in a sense equally general. The petitioner, then, by its incorporation, became authorized to construct a railroad between the designated points; and the authority thus obtained included *ex vi termini*, that of constructing an elevated railroad. A question of construction, bearing a close analogy to the one we are here considering, arose in *Bishop v. North*, 11 Mees. & W. 418. There a statute passed in 1792, and long before steam railroads had an existence, provided, in substance, that in case the proprietor of any manor or estate containing any mines of coal or other minerals should find it expedient or necessary to make any railway or road to carry his coals, etc., over the lands of any other person, it should be lawful for him to make such railway or road; he first paying or tendering satisfaction for the damages to be thereby occasioned to such lands. In 1843 the question arose whether, under that act, a railway could be built over the lands of another, on which steam cars and engines were to be used; it being contended that railways which required locomotive engines were not and could not have been contemplated by said act; no such railway being then in existence. The court in holding that the act included steam railways, said: "The power given by the act is to make any railway, and it is not shown that the term 'railway' has any definite meaning, requiring it to be made on a level; and I cannot think it can be qualified by showing that at the time of the passing of the act a particular species of railway unlike the one contemplated, was in use. The power is general, to make railways over the lands or grounds of any person or persons, making satisfaction for the damages to be occasioned thereby." In *City of Chicago v. Evans*, 24 Ill. 52, a question arose upon the construction of an act which provided that all railway companies incorporated under the laws of this state should have power to make contracts or arrangements with each other, or with railroad companies in other states, for leasing

Scope of the term "railroads."

or running their roads, or any part thereof; the question being whether said act was broad enough to include horse railroads. In deciding that question in the affirmative, it was said: "That act, in terms, applies to all railroads organized or incorporated under, or which may be incorporated or organized under, the authority of the laws of this state; and it provides that they shall have the power to make such contracts and arrangements with each other for leasing or running their roads, or any part thereof, also the right of connecting with each other, on such terms as shall be mutually agreed upon by the companies interested. This language is manifestly sufficiently comprehensive to embrace horse railways as well as railroads whose cars are propelled by steam or other power; as well roads authorized to transport passengers only as roads authorized to transport passengers and freight by other power. The language of the enactment embraces all roads then organized, as well as those which might afterwards become so, and the act makes no distinction or reservation as to the character of the railroad." See also, *Clinton v. Clinton & L. H. R. Co.*, 37 Iowa, 61; *Oler v. Baltimore & R. R. Co.*, 41 Md. 583; *New York Cable Co. v. Mayor, etc., of N. Y.*, 104 N. Y. 1; *Bulton v. Short Route R. Transfer Co.*, (Ky.), 32 Am. & Eng. R. Cas. 256. Under these authorities, it cannot be doubted that the act of 1872, which provides for the incorporation of companies "for the purpose of constructing and operating any railroad in this state," applies to elevated railroads, and that the petitioner, being incorporated under that act, with authority to construct a railroad, without qualification or limitation as to its character, is authorized to construct an elevated railroad.

Nor are we able to see that the question is materially affected by the provisions of the "Act in regard to elevated ways or conveyors," approved April 7, 1875. 2 Starr & C. St. p. 1877. If that act was intended to have any reference to elevated railroads, which we think to be extremely doubtful, the articles of incorporation in this case are in full compliance with the terms of that act, as the only requirement of that act applicable thereto is the one which provides that the articles of incorporation of companies organized for the purpose of constructing an elevated way or conveyor shall state the places from and to which it is proposed to construct the same. This the articles of incorporation in question do. Nor does the question seem to be affected by the fact that the act in regard to elevated ways and conveyors authorizes the organization of companies for that purpose under the provisions of chapter 32 of the Revised Statutes. It does not require that they

should be organized under that chapter, but merely provides that they may be so organized; and, if an elevated way was intended to include an elevated railroad, there seems to be nothing in the act which prohibits the organization of companies for the purpose of building such elevated railroads under the act in relation to the incorporation of railroad companies. The only limitation in the act of 1875 is that the articles of incorporation shall state the termini of the proposed elevated way,—a statement which is also required by the act in relation to the incorporation of railroad companies, and which was complied with in the petitioner's articles of incorporation.

Limitation in  
Act of 1875.

It is next urged that the court erred in limiting the evidence of the value of the property to be taken, and of the damages to the property not taken, to October 18, 1888, the date of filing the original petition, instead of September 8, 1890, the date of the last amendment to the petition. It is true the petition was several times amended in respect to the description of the property sought to be condemned, but we think it to be sufficiently evident that said amendments were in the direction of giving a fuller and more certain description of said property, and not by way of substitution of one parcel of land for another. It seems to be plain that the property described in the amended petition, and actually condemned, was the same property attempted to be described in the original petition; and an amendment in the direction of giving a fuller, or even a more accurate, description, so long as there is no attempt to substitute other property for that originally described, cannot be held to be tantamount to the filing of a new petition, so as to change the date in respect to which the compensation should be estimated. We think the court properly restricted the evidence of value to the date of filing the original petition, under the rule laid down in *Commissioners v. Dunlevy*, 91 Ill. 49.

Amendment  
to petition.

At the trial the counsel for the petitioner was permitted, against the objection and exception of the respondent, to read in evidence to the jury a stipulation by the petitioner, entered into in pursuance of resolutions of the petitioner's board of directors to the same effect, that the railroad to be constructed upon the premises sought to be condemned should be used and operated subject to the following conditions: (1) That it should be used only for passenger traffic; (2) that no soft or bituminous coal should be used or burned in the locomotives hauling trains upon said road, or in heating the cars running upon said road; and (3) that the motive power should be fully equipped with the best modern devices calculated to render it noiseless and

Effect of  
stipulations.

smokeless, and to prevent the discharge of cinders and sparks. The admission in evidence of this stipulation is assigned for error. We are of the opinion that it was properly admitted. That the stipulation was executed on behalf of the petitioner, by competent authority, cannot be questioned, as it was accompanied by a certified copy of the resolutions of the petitioner's board of directors, expressly authorizing its execution. In its subject matter, also, it is a stipulation which it was competent for the petitioner to make. The terms of the petitioner's articles of incorporation are general, and under them, the necessary consent of the municipal authorities of Chicago being first obtained, any structure properly embraced within the general designation of a "railroad" could be built, and such railroad could be used for any of the purposes to which such structures could appropriately be applied. It could be used for the transportation of passengers only, or of freight only, or of both; and the petitioner, so far as was consistent with due care for the rights and safety of others, would be at liberty to select such machinery and appliances, and make use of such fuel, as it should see proper. Manifestly the damages to abutting property owners consequent upon the construction and operation of such railroad would to a very considerable degree depend upon the nature of the road, the purposes to which it was to be applied, the mode in which it was to be constructed, the character of its machinery and appliances, and the fuel to be used. So long as the petitioner retained the broad discretion conferred by its charter, property owners, whose property would be damaged by the construction and operation of the road, would have a right to have their damages estimated with reference to any use to which the petitioner, under its charter, would be at liberty to apply its railroad when built. But the petitioner is in fact proposing to build a road to be used for passenger traffic only, and, with a view of making it as inoffensive as possible to adjoining property holders, it is willing to abandon its right to burn bituminous coal, and to bind itself perpetually to provide and make use of the best modern appliances calculated to render its road noiseless and smokeless, and to prevent the escape of sparks and cinders; and it had, therefore, a right to limit and bind itself in these respects by the resolutions of its board of directors, and by a stipulation executed in pursuance of such resolutions. By the stipulation, it abandons the exercise of its franchises contrary to the mode stipulated, and its scheme is thus narrowed and definitely limited. The rights which it seeks to obtain by condemnation can be used and exercised only in subordination to the terms of the stipulation. This being so, it had a right to lay before the jury

the exact scheme in pursuance of which its railroad is to be built and operated, and to have the facts thus presented taken into consideration in assessing the damages to the property not taken.

Various errors are assigned upon the rulings of the court in the instructions to the jury. Several of the points thus raised are disposed of by what has already been said. As to the other points made, all we think it necessary to say is that we have examined them with care, and have duly considered the suggestions of counsel in relation thereto, and that we find none of them well taken. Nor do any of them seem to be of sufficient importance to warrant our extending this opinion by noticing them in detail.

On the whole record, we are of the opinion that no material error is shown, and the judgment of the circuit court will therefore be affirmed.

**Eminent Domain—Certiorari to Review an Order Appointing Commissioners—Effort to Purchase.**—On *certiorari* to review an order appointing commissioners for the condemnation of land under the general railroad law, if it appear that a *bona fide* reasonable effort to purchase has not been unsuccessfully made by the petitioning company, although the owner was accessible and competent to sell, the order will be set aside, and on such a *certiorari*, if it appear that the petitioning company knew the name of the owner of the land, and, in its application for appointment of commissioners, did not give the name of such owner, but named as owner another person known by it not to have any interest in the land, the order appointing commissioners will be set aside at the instance of the real owner and the person named as owner. *Chambers v. Carteret & S. R. Co.*, 54 N. J. L. 85.

**Time as to Which Damages are to be Estimated.**—Under a statute (2 Comp. Laws Utah, § 3852) providing that in proceedings to condemn land for railroad purposes, the damages "shall be deemed to have accrued at the date of the summons," in an action commenced by summons against a trustee in a trust deed, to which the owner of the land sought to be taken subsequently became a party defendant by amendment and voluntary appearance, *held*, that the damages should be estimated from the date of his appearance. The court said: "This is a suit to condemn right of way for a railroad. It was commenced originally against Bacon alone as trustee, and summons issued December 24, 1889. Afterwards, August 25, 1890, the Mitchells were made parties by stipulation, and they appeared without summons. Trial was had February 25, 1891, and judgment in favor of defendants Mitchell for \$1,975 and costs and the value of the fence, \$325. The evidence showed Mitchells owned the land, and Bacon had no interest in it only as trustee in a trust deed to secure the payment of a loan of \$5,600. This was evidenced by a trust deed in the usual form. There is no complaint that damages assessed are too high; but the plaintiff and appellant complains of the instruction of the court to the effect that the value of the land and estimation of damages should be made as of the date of August 25, 1890, and contends that the value of the land and estimation of damages should have been made as of the date of the summons, —December 24, 1889. We think the instruction was right. The Mitchells were the only persons entitled to damages. Bacon had no interest in the damages whatever, and was properly a party for the purpose of seeing

that the security for the loan he represented was not impaired. If damages had been allowed him, the Mitchells would have been entitled to receive the full amount thereof credited on their indebtedness. For practical purposes, under the eminent domain statutes of this territory, they were the owners; and the condemnation of the land by a proceeding in which they were not parties would have been of no avail, and would have given the plaintiff company no right to enter upon the land and use it for the construction of their railway. Hence they were necessary parties to the proceedings of condemnation. 2 Comp. Laws Utah, § 3852, provides that the damages 'shall be deemed to have accrued at the date of the summons.' Summons was issued against Bacon alone on December 24, 1889, on a complaint against him alone, and afterwards the complaint was amended so as to make the Mitchells parties, and on August 25, 1890, they appeared and answered by stipulation without summons. If they had not appeared, it would have been necessary to have issued summons to them to make them parties, and their damages under the statute would have accrued as of the date of the summons against them. It was for the benefit of the plaintiff that they appeared without summons, and, because they did that, is it reasonable that they waived their right to have their damages assessed according to law? These views need no authority in their support; they are rudimentary." *Oregon Short Line & U. N. R. Co. v. Mitchell* (Utah, Sept. 12, 1891,) 27 Pac. Rep. 693.

In proceedings for the condemnation of land for railroad purposes under the statutes of Idaho, the value of the land at the time it is taken is the measure of damages, and it is error to admit evidence of value at time of trial. Where, however, one witness stated the basis of his estimate of damages to be the value of land at the time of the trial, and several others stated that their estimate was based upon the value at the time of the taking, and the court repeatedly charged the jury that the value of the property at the time of the taking was the true basis, the refusal of the court to strike out the testimony of such first witness, held not to be reversible error. *Spokane & P. R. Co. v. Lieualien* (Idaho, April 1, 1892,) 29 Pac. Rep. 854.

In a proceeding under sections 6448, 6449, Ohio Rev. St., by an owner of land wrongfully occupied by a railroad company, to compel the company to appropriate and pay for the same, the measure of compensation is the value of the land at the time it is assessed in the proceeding. *Pittsburgh & W. R. Co. v. Perkins* (Ohio, April 26, 1892,) 31 N. E. Rep. 350. And see generally as to time as to which damages are to be computed in eminent domain proceedings, *Chicago M. & St. P. R. Co. v. Randolph Town-site Co.* (Mo.) 47 Am. & Eng. R. Cas. 118, note 128.

**Effect of Omission of Notice to Occupant of Land.**—The written notice to the actual occupant of land, a part of which is condemned for railroad purposes, required by paragraph 1209, Kansas Gen. St. 1889, is not part of the condemnation proceedings, and the failure to give that notice does not invalidate such proceedings. The railroad company which fails to give such a notice before commencing the construction of their line of road over the land actually occupied is liable for all damages occasioned by their failure to do so. The court said: "It is said that the failure of the railway company to serve written notice on a tenant of the owners, who was in actual possession of the land, invalidates the proceedings, it being admitted that no such notice was ever served. In the first place, the section that requires such notice to be served is no part of the condemnation proceedings. *Hunt v. Smith*, 9 Kan. 137; *Missouri River S. F. & G. R. Co. v. Shepard*, *Id.* 647; *Chicago K. & W. R. Co. v. Grovier*, 41 Kan. 685, 39 Am. & E. R. Cas. 146; *Chicago K. & W. R. Co. v. Abbott*, 44 Kan. 170. Admitting that it is absolutely required to be given before the con-

struction is commenced, then it would only affect the questions of damages occasioned by their failure to do so. It is said in the case of *Railroad Co. v. Shepard* that the object of such a notice 'is to inform the occupant that the company is about to commence work, so that he may prepare his fences, so as to confine his stock and preserve his crops.' It is perfectly evident that this question does not affect in any manner the validity of the condemnation proceedings. Such a notice is required under the general law of the state, but it has been held that the want of it is not a jurisdictional defect." *Chicago, K. & N. R. Co. v. Grieser* (Kan., May 7, 1892,) 29 Pac. Rep. 1082.

## GORGAS

v.

PHILADELPHIA, HARRISBURG & PITTSBURG R. CO.

(144 Pa. St. 1.)

**Eminent Domain—Damages—Deprivation of Certain Privileges.**—In estimating the damage arising from the taking of a strip of plaintiff's land for the construction of a railroad, interference with the plaintiff's access to a watering place for his cattle on the farm of another across the highway from his own farm, and in which watering place he had no right or any right of access thereto that was not common to the public, such cutting off of access to the watering place will not be considered as an element of damages.

**Set-off of Special Benefits—Location of Station.**—Where a plaintiff derived special advantages by reason of the construction of a railroad, (such as the location of a station near his land,) such advantages may be set off as against actual disadvantages to his property and the question of special advantages is one for the jury.

**Instructions on Question of Damages—View of Land.**—It was not error for the court to instruct the jury who had viewed the land that "the statements of witnesses who have testified must be considered by them, yet they were not bound to be controlled thereby if their own examination of the premises led to a different conclusion," when taken in connection with the portion of the charge immediately following: "You are to judge of the amount of damages suffered by the plaintiff from the inspection you made of the premises, as well as from the opinions of others who have made an examination, and you gave their opinions under oath. What you saw on the ground, therefore, and what you should have heard from the witness stand, should be the basis of your conclusion."

**Competency of Witnesses as to Market Value.**—One who has no knowledge of the market value of land in the immediate neighborhood of the land sought to be taken in condemnation proceedings is not a competent witness to testify to the damage done to the land from the construction of a railroad. But one who knows the land, although he lives several miles away and has acted as a viewer appointed by the court in estimating the damages to it, is competent to give his opinion on the question of damages.

APPEAL from Cumberland County Court of Common Pleas. Trespass.

51 A. & E. R. Cas.—38



The defendant company took land belonging to plaintiff in the construction of its road. From the award of the viewers finding \$2,000 damages plaintiff appealed, and the court ordered the case to be put at issue in an action of trespass.

*D. M. Graham* and *F. E. Beltshoover*, for appellant.

*J. W. Wetsel*, for appellees.

PAXSON, C. J.—The defendant company took about five acres of the plaintiff's land in the construction of its road. The jury appointed by the court below to assess the damages awarded him the sum of \$2,000. From this award he appealed to the common pleas, with the result of a verdict in his favor of \$2,885. He is still dissatisfied, and has entered an appeal to this court, alleging a number of errors upon the trial below.

The first point was intended to define the "just measure of damages." It contains eleven paragraphs, in each of which is a distinct subject for the consideration of the jury in assessing the damages. The court below might well have refused this point, in view of the manner in which it is put. The learned judge, however, affirmed all of the propositions, except the eighth, in which he was asked to instruct the jury that "the damage arising from the interference with the plaintiff's watering place for his cattle and stock" was an element of damage. It may be that, had the access to the water on his own farm been cut off or seriously interfered with, the proposition should have been affirmed. But it was refused upon the ground that the water referred to was on the public highway, and within the boundaries of the farm of an adjoining owner. When used by the plaintiff, it had to be reached by passing over this public highway, which has been crossed by the railroad of the defendant company. The plaintiff had no right to the water, nor of access to it, that was special to himself or his land, or that was not common to the public. The plaintiff was merely deprived of what did not belong to him. We find no error in the answer to this point. *Patten v. Northern Cent. R. Co.*, 33 Pa. St. 426.

Nor do we find error in the answer to the defendant's third point, or in that portion of the charge embraced in the third assignment. The learned judge correctly told the jury that, if they "find that special advantages have accrued to plaintiff by reason of the construction of the railroad of the defendant as set forth in this point, then you can set them off as against the actual disadvantages to his farm." Whether the matters referred to were special advantages was for the jury. If they were, no

Special benefit.

reason is apparent why they should not have been set off against the disadvantages. The case was argued here as though the learned judge had instructed the jury that, because a station was located near to the land of the plaintiff, therefore it was a special advantage. He gave no such instruction, as has already been seen. A station may or may not be a special advantage. We cannot say, as matter of law, that it may not be. Its value would depend upon circumstances, the possibility of its being removed, etc., and the question of special value must be determined by the facts of each particular case. The fourth assignment is covered by what has already been said in answer to the first.

The fifth assignment was strongly pressed upon the argument, and I understand it to be the one most relied upon by the plaintiff. It alleges that the court erred in the following portion of its general charge: "In addition, you are what is called a 'struck jury.' You were taken upon the ground, and had the opportunity to view and examine the premises yourselves. This was done in order that you might be aided in coming to a correct conclusion as to the contention between the parties.

In ordinary cases, the jury is to be governed by the testimony of the witnesses examined in their presence; and, while you have been qualified to give a true verdict according to the evidence, that evidence in this case consists of what you have seen on the ground, as well as the testimony of the witnesses who have been examined during the trial before you in court. What you observed on the view, then, you must remember as a part of the evidence in the case. The statements of the witnesses who have testified must be considered by you, yet you are not bound to be controlled thereby, if your own examination of the premises leads you to a different conclusion." The last sentence above quoted is the one which was especially criticised. It often happens that by selecting a passage from a charge, and omitting what immediately preceded and followed it, an erroneous impression may be created. Moreover, it does injustice to the learned judge below. The portion of the charge immediately following the extract quoted is as follows: "You are to judge of the amount of damages suffered by the plaintiff from the inspection you made of the premises, as well as from the opinions of others who have made an examination, and gave you their opinions under oath. What you saw on the ground, therefore, and what you have heard from the witness stand, should be the basis of your conclusion." The portion of the charge assigned as error, with this addition, is unobjectionable. The

Instructions  
to Jury.

jury were instructed to base their verdict upon the testimony of the witnesses and what they saw on the ground. The object of a view in such cases is to enable the jury to better understand the testimony. "It was never intended that the view of the jury should be substituted for the evidence, and that they should make up their verdict from the view, in disregard thereof." *Flower v. Baltimore, etc. R. Co.*, 132 Pa. St. 524.

A view may sometimes be of the highest importance, where there is a conflict of testimony. It may enable the jurors to see on which side the truth lies; and if the witnesses on the one side or the other have testified to a state of facts which exists only in their imagination, as to the location of the property, the manner in which it is cut by the road, the character of the improvements, or any other physical fact bearing upon the case, they surely cannot be expected to ignore the evidence of their senses, and give weight to testimony which their view shows to be false. This is all that is to be fairly implied from the language of the court below. Were it otherwise, a view would be the merest farce. This is fully sustained by *Patton v. Northern Cent. R. Co.*, *supra*; *Hartman v. Reading & P. R. Co.* (Pa. Sup.) 13 Atl. Rep. 774; *Traut v. New York C. & St. L. R. Co.*, 1 Monaghan, 394. (Pa. Sup.) 15 Atl. Rep. 678. It was said by Mr. Justice STERRETT in the case last cited: "The manifest purpose of this requirement [view] is to afford the viewers an opportunity of acquiring better and more accurate information as to the matters on which they are to pass than it is possible in many cases to obtain from the testimony of witnesses alone." The true rule in such cases is believed to be that the jury in estimating the damages shall consider the testimony as given by the witnesses, in connection with the facts as they appeared upon the view; and upon the whole case, as thus presented, ascertain the difference between the market value of the property immediately before and immediately after the land was taken. This difference is the proper measure of the damages.

We find no error in the rejection of the testimony of the witness Jonas Kohler. See sixth assignment. He appears not to have had any knowledge of the market value of lands in that neighborhood, which was a sufficient reason for the exclusion of his testimony. Nor do we think it was error to admit the testimony of Thomas R. Burgner.

It is true he lived several miles away, but he knew the property; had passed along it on the road occasionally. Moreover, he had acted as a viewer appointed by the court.

He was not asked to give his opinion as a viewer, but from his observation while acting as such.

That a viewer, in such cases, is a competent witness, was ruled in *Dorlan v. East Brandywine & W. R. Co.*, 46 Pa. St. 520. Judgment affirmed.

**Eminent Domain—Consideration of Special Value of Land for Particular Purposes in Estimating Damages.**—See *Payne v. Kansas & A. V. R. Co.* (C. C.) 47 Am. & Eng. R. Cas. 228, and cases cited in note, 247.

**Evidence of Special Use as Affecting Value of Land Taken.**—In estimating the value of land condemned for railroad purposes evidence may be given of its value for special use, although the owner of the land has never put it to that use. The court said: "Appellant complains of the ruling of the trial judge in permitting the question, 'What is the value of this land for the purpose of raising hops?' to be propounded to, and answered by, a witness. It is claimed that this evidence was inadmissible and misleading, for the reason that the land had never been used for raising hops, and that the value put upon it for that purpose was in excess of the real value. Before this question was asked it had been shown that this land was very fertile and productive, and that it was underdrained and thoroughly prepared for agricultural purposes. It had been devoted to raising hay for several previous years, not because nothing else would grow upon it, but because the hay crop was more profitable than any other. The witness answered that the land was worth \$300 an acre for raising hops; but other witnesses had already testified that it was worth that sum for general agricultural purposes, and especially for raising hay. Appellant could not, therefore, have been prejudiced by the answer to the question, even if we concede that the question itself was improper, which we do not. The market value of the property is its value for any use to which it may be adapted; and in estimating its value all the uses of which the property is susceptible should be considered, and not merely the condition in which it may be at the time, and the use to which it may have been put by the owner. *Lewis, Em. Dom.* 478. In *San Diego Land & Town Co. v. Neale*, 78 Cal. 80, this question was thoroughly discussed, and many authorities cited and reviewed, and it was there held that it was proper to show the value of the land sought to be condemned, 'as a reservoir site.' In *Boom Co. v. Patterson*, 98 U. S. 403, three islands in the Mississippi river were sought to be appropriated for the purpose of a boom. The land had never been used for such purpose, and for any other purpose was of little value. But, in view of its peculiar adaptability to boom purposes, it was found to have a great value. The Supreme Court of the United States sustained a verdict for \$9,358.83, although the value of the property for general uses was but \$300. With reference to the question of value, where land is taken by the exercise of the right of eminent domain, the court, by FIELD, J., said: 'In determining the value of land appropriated for general public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value, which can be readily estimated. \* \* \*

Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.' So, the owner of the land in question in this case had a right to show, if he could, that his land was available for the purpose of hop culture, and to insist that its value should be estimated with reference to that circumstance, although no hops had ever been grown upon it." *Seattle & M. R. Co. v. Murphene*, (Wash., June 24, 1892,) 30 Pac. Rep. 720.

**Eminent Domain—Set-off of Benefits Against Damages.**—In condemning land for railroad purposes, the benefits conferred by the laying of the road cannot be set off against the damages sustained by the land owner. *Packard v. Bergen Neck R. Co.*, (N. J. Supreme Ct., Feb. 24, 1892,) 23 Atl. Rep. 722.

The correct rule in an action to recover damages for appropriation of a right of way by a railroad company without license through plaintiff's farm is, that the jury should consider the value of the land taken and the damage, if any, and deduct the benefits peculiar to such tract arising from the running of the road through it. *McReynolds v. Kansas City, C. & S. R. Co.*, (Mo., June 6, 1892,) 19 S. W. Rep. 824, followed by *Ragan v. Kansas City & S. E. R. Co.*, (Mo., Sept. 20, 1892,) 20 S. W. Rep. 234.

*Benefits Arising from Building of the Road a Question for the Jury.*—Where, in condemnation proceedings of land for railroad purposes a statute (Code Civil Proc. Colorado § 254) provides that the verdict of the jury shall state the amount and value of the benefits to the land arising from the building of the road, it is error for the judge to take from the jury the consideration of a question the determination of which the law imposes upon them, by stating to them that "in this case there seems to be no evidence of any such benefits." *Rio Grande Southern R. Co. v. Knight*, (Colo., Nov. 9, 1891,) 28 Pac. Rep. 19.

*Measure of Damages not Based on Increased Value of Land by Reason of Improvements by Railroad.*—Under Washington Constitution, art. 1, sec. 16, which provides that compensation for land taken by a corporation for public purposes shall be ascertained "irrespective of any benefit from any improvement proposed by such corporation," the railroad company seeking to condemn land which has risen in value on account of the prospect of the proposed road, is not required to pay damages upon the basis of such increased value. The court said: "A point is made as to the basis upon which the respondents were allowed to recover damages, which was the value of the land at the time of its appropriation. The appellant contends, and there was testimony to show, that this land was considerably enhanced in value in consequence of this projected line of railway which was then in process of construction. The appellant contends that this increased value, which was due to the building of the very road for which the right of way through this land was sought, and to nothing else, should not have been taken into consideration in estimating the damages; while the respondents claim that they were entitled to have this considered by virtue of sec. 16, art. 1, of our state constitution, which provides that compensation in such cases shall be ascertained 'irrespective of any benefit from any improvement proposed by such corporation.' The position taken by appellant is the correct one. The basis for the estimation of the damages is the value of the land as it would be at the time of the appropriation, if the road was not to be built. The constitutional provision referred to only provides that the benefits, if any, of the proposed improvements shall not be allowed to set-off or diminish the damages sustained. If the prospect of this proposed road had greatly enhanced the value of the respondent's land, as claimed, it would be highly inequitable to require the appellant to

pay damages upon the basis of this increased value when it would not be entitled to have the benefit, if any, to the land left taken from the value of the land appropriated. The reason for allowing the land owner in such cases the benefits arising to the land not taken, because he only receives such benefits in common with other land owners in the vicinity, can hardly be allowed to extend to the length of allowing him to recover the increased value of the land taken, or of damages, estimated upon that basis, to the land left, in consequence of the taking of the particular strip. The measure of damages would be the difference in amount between the value of the tract as a whole, not including therein the increased value, if any, occasioned by the proposed improvements, and the value of the land left, and not including therein such increased value." *Northern Pac. & P. S. S. R. Co. v. Coleman*, (Wash., Dec. 1, 1891,) 28 Pac. Rep. 514.

*Evidence as to Benefits—Making Markets More Accessible.*—Under the constitution of California, art. 1, § 14, a railroad company, in appropriating a right of way, is not permitted to show that the construction of its road would prevent the depreciation of the land not taken by reason of making the products of the land more accessible to the public markets. The court said: "The damages alleged to have been done to the land of defendant H. H. Linville, who owned it separate from the other defendants, was being inquired into from him as a witness, and upon cross-examination he was asked by plaintiff's counsel these questions: 'Is it not a fact that oranges will bring a better price by reason of the railroad being there? Isn't the value of the crop dependent on the market that you have for it, and its accessibility to the market? Will not the accessibility of the produce of the land to the market by reason of the construction of that road prevent any depreciation in its value?' These were all objected to, and the objections sustained by the court on the ground that they were immaterial and irrelevant, in that they sought to show benefits accruing to the land by reason of the improvement proposed; that is, the construction of the railroad. It is argued for the appellant that these questions only sought for evidence to show that the land not taken for the right of way would not be depreciated in value; and therefore no damages could result to it, and that such evidence would not go to show a benefit. We do not so understand the questions. They certainly called for evidence which might show a benefit from the improvement proposed. Art. 1, § 14, of the state constitution reads thus: 'Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in a court of record, as shall be prescribed by law.' It is argued for appellant that the prohibition contained in this section against taking into consideration the benefit to arise from the improvement is limited to that land which is taken for the right of way, and has no reference to benefits that may accrue to the land not taken. This position, however, is in direct opposition to the construction given to the section by this court in *Pacific Coast R. Co. v. Porter*, 74 Cal. 261, 33 Am. & Eng. R. Cas. 167, and which was afterwards expressly approved in *Muller v. Southern Pac. Branch R. Co.*, 83 Cal. 245. While it is true that, if it could be shown that the value of the land would be enhanced by reason of the improvement, the damage sustained by the owner would be to that extent reduced, still such evidence would be only another mode of showing the amount of benefit derived from the improvement; and inasmuch as the

constitution declares that the owner is entitled to receive full compensation for the damage done to his land, as well as for the land which is taken, irrespective of any benefit to be thereafter derived by reason of the improvement, such evidence would be irrelevant and immaterial." *San Bernardino & E. R. Co. v. Haven* (Cal., May 7, 1892,) 29 Pac. Rep. 875.

**Opinion Evidence on Question of Damages.**—In an appeal from an award made in a proceeding to condemn a right of way for a railroad over a highway which ran through a tract of land, it was error to permit a witness to state, over objection, what, in his opinion, was the increased burden to the fee of the land by reason of the construction of the railroad over the highway, and also to state how much the land was depreciated in value per acre by reason of the construction and operation of the railroad through the same. *Chicago, K. & W. R. Co. v. Woodward* (Kan., May 7, 1892,) 29 Pac. Rep. 1146.

**Estimate as to Damages to Particular Tract—Qualification of Witnesses.**—In condemnation proceedings witnesses shown to be qualified to testify on the subject of damages, may, in the discretion of the court, be permitted to give their estimate of the damages to a particular tract from the construction of a railway through it, or the court may require them in the first instance to state the basis of their estimate. *Minnesota Belt Line R. Transfer Co. v. Gluck*, 45 Minn. 463.

**Opinion Evidence as to Value of Land.**—In condemnation proceedings for railroad right of way, it is competent for a witness, who is acquainted with the value of lands in the locality, to testify as to the value of the land before and after the railroad ran through it, without first disclosing knowledge of the location, grades, and cuts of the road. The court said: "As to the competency of some of the witnesses to speak upon the question of the value of the land with and without the railroad. The witnesses first testified that they resided in the locality, and were acquainted with the value of lands in that locality; that they were acquainted with this particular land; and then they were asked what was its value before the railroad ran through it, also after the railroad ran through it, and they answered both questions. It is contended that the witnesses, before they were permitted to answer, should have been required to show their knowledge of the railroad, the way it is located across the land, the fills and cuts, and other matters affecting the question of damages. The knowledge of these facts goes to the weight to be given to the testimony of the witness; but the witnesses showed themselves competent to speak upon the question, and counsel for appellant had the right to more fully examine the witnesses upon their knowledge of the land, its location and location of the railroad, and how the grade or fills or cuts affected its value, as tending to lessen the weight to be given to their evidence. Counsel contend that they are expert witnesses, and they must state the facts upon which they base their opinions. In speaking of values the facts necessary to entitle the witness to speak are that he is acquainted with the market value of such property in that locality, and that he is acquainted with the property upon which he places a value. The appellee in this case owns a tract of land a half mile in length by 320 feet in width, situate within three-eighths of a mile of the corporate limits of the city of Evansville, and within one-eighth of a platted addition to the city, with a main road leading into the city bordering on each end of the land. The appellant located a railroad across the land, and commenced legal proceedings to condemn the right of way. An appeal is taken, and the case comes up for trial. A witness is called, and asked if he is acquainted with the value of land in that locality. He answers that he is. He is then asked if he is acquainted with the land of the appellee. He is then asked the market value of the land before the railroad ran through it.

Objection is made on the ground that the witness has not shown himself competent to speak. The witness is permitted to answer, and he is then asked what is the market value of the land now, with the railroad through it. The same objection is made and overruled, and the witness answers. These questions assume and it is admitted that, at the time the witness is speaking, there is a railroad constructed and running across the land, and the witness says he is acquainted with it. If acquainted with it, he is acquainted with it having the railroad of the appellant running across it. So that the question sought to be presented and discussed by counsel for appellant is not in fact presented by the record; for, in the form the questions are propounded to the witnesses, they assume, and it is not controverted, that the railroad of appellant runs through the land at the time, and the witnesses testify that they are acquainted with it, and, if acquainted with it, they know of the railroad, and upon the theory of appellant's counsel are qualified to speak of its value. We have put the question in the strongest light for the appellant, as most of the witnesses reside in the neighborhood, own land both near to and within the city limits, show a personal acquaintance with appellee's land, and a general knowledge of the value of land in that locality. There is no error in the record. Judgment affirmed, with costs." *Ohio Valley R. & Terminal Co. v. Kerth* (Ind., Feb. 17, 1892.) 30 N. E. Rep. 298.

In *Evansville & R. R. Co. v. Fettig* (Ind., Dec. 16, 1891,) 29 N. E. Rep. 407, a witness testified, in condemnation proceedings of land for railroad purposes, that he was acquainted with the location and shape of the land; that it was cleared and fenced, with no buildings upon it; and, although it had not been platted, was good to lay out in town lots. *Held*, that his opinion was competent as to the value of the land before the road was built.

**Opinion Evidence of Special Value of Land Taken.**—Where property sought to be condemned for railroad purposes is shown to be of uncertain market value, the opinion of witnesses as to a special value in the property for particular uses, is admissible in evidence, as well as any special circumstances upon which such opinions are founded. *Denver & R. G. R. Co. v. Griffith* (Colo., Sept. 24, 1892.) 31 Pac. Rep. 171.

**Opinion Evidence as to Decrease in Value of Land.**—In an action for damages against a railroad company it is competent to ask a witness who has knowledge of the property, whether the building of the railroad across plaintiff's farm, increased or decreased the value of the farm; and, where witness answers that it has decreased the value, it is competent to ask him how much, in his judgment, the property has decreased in value. The court said: "We find nothing objectionable in the allowance of these questions. It was clearly competent to ask a witness, who had knowledge of the property, whether its value was increased or diminished by the construction of the railroad through it. And, if its value was lessened by such construction, we see no reason why he may not say how much, provided he has knowledge. It is true, the measure of damages is the difference between the market value of the property immediately before and immediately after such construction. We think the questions referred to bore directly upon this question, and were at least competent to go to the jury. It is not always possible to fix with certainty the market value of a farm. At most it can only be done approximately, and evidence which tends to show that its value has either been increased or diminished by the construction of the road is some evidence to enable the jury to determine this question. Judgment affirmed." *Beck v. Pennsylvania, P. & B. R. Co.* (Pa. March 28, 1892,) 23 Atl. Rep. 900.



**Expert Evidence as to Sales of Adjoining Land.**—Where farmers or others give their opinions, as experts, as to the market value of land with which they are acquainted, it is not improper, upon cross-examination, for the purpose of testing their knowledge and competency, to inquire of the propriety of allowing proof of the sales of similar property to that in question, made at or about the time of the taking, is sustained by some of the authorities, and opposed by others. Such proof is held competent in Illinois, Iowa, Massachusetts, New Hampshire, New York, and Wisconsin, and wholly incompetent by the courts of Pennsylvania and Minnesota. *Lewis, Em. Dom.* § 443. In a Massachusetts case it was said that: 'The price for which other adjacent lots had been actually sold was admissible, open, of course, to any evidence explanatory of the circumstances attending such sale, and tending to show why the purchasers gave a price greater than the true value of the land. If it had been a price fixed by a jury, or in any way compulsory paid by the party, the evidence of such payment would be inadmissible before the jury. Upon the principle on which we should admit evidence of other sales between other parties of adjacent lots this evidence was admissible, and none the less so because the railroad corporation were themselves the purchasers.' *Wyman v. Lexington & W. C. R. Co.*, 13 Met. (Mass.) 316. 'The objections to evidence of special sales of land are stated in *Railroad v. Hiester*, 40 Pa. St. 53, where the court, speaking of similar evidence received in that case, says: 'It did not pretend to fix the market value of the land, but assumed to ascertain by the special, and it may be exceptional, cases named. This would not do; for, if allowed, each special instance adduced on the one side must be permitted to be assailed, and its merits investigated, on the other; and thus would there be as many branching issues as instances, which, if numerous, would prolong the contest interminably. But even this is not the most serious objection, such testimony does not disclose the public and general estimate which, in such cases, we have seen is a test of value. It would be as liable to be the result of fancy, caprice, or folly, as of sound judgment in regard to the intrinsic worth of the subject-matter of it, and consequently would prove nothing on the point to be investigated. The fact as to what one man may have sold or received for his property is certainly a collateral fact to an issue involving what another should receive, and, if in no way connected with it, proves nothing. It is therefore irrelevant, improper, and dangerous.' *Stinson v. Chicago, St. P. & M. R. Co.*, 27 Minn. 284-289; *Kansas City & T. R. Co. v. Splitlog*, 45 Kan. 68; *Kansas City & T. R. Co. v. Vickroy*, 46 Kan. 248. In this case, however, the land owners did not prove, or offer to prove, to make out their case, any special sales of property adjoining the land in dispute. The evidence objected to was drawn out upon cross examination, and we think, where experts or persons are permitted to give their opinions as to value of land, a cross-examination of the kind referred to is not improper, or any ground for the reversal of a case. *Kansas City & T. R. Co. v. Vickroy*, 46 Kan. 248. In that case it was decided that, "in appeals from the awards of commissioners in condemnation proceedings, opinions as to the value of property should be confined to the property in question, unless, on cross-examination, for the purpose of testing the knowledge and competency of the witness, the value of adjoining property is inquired of." *Chicago, K. & N. R. Co. v. Stewart*, (Kan. Feb. 6, 1892,) 28 Pac. Rep. 1,017.

**Owner of Land a Competent Witness to Testify as to Depreciation of Land Not Taken.**—In condemnation proceedings by a railroad of land for a right of way, the owner of the land is a competent witness to testify as to how much, in his opinion, the portion of the land remaining, after the taking

by the railroad company, will be depreciated in value on account of the appropriation, and the construction of the road. The court said: "It is objected that one of the respondents was permitted to state how much, in his opinion, the land would be depreciated in value on account of the appropriation of the right of way and the construction of the railroad. It is conceded by appellant that it is competent for a witness, if properly qualified, to state his opinion as to the value of the land before and after the appropriation; but it is contended that it is for the jury to say what the damages are, and not the witness. While there is undoubtedly a conflict of authority upon this question, it seems difficult to perceive any substantial reason for rejecting such testimony. To admit evidence of the value of the land before and after the taking is to admit, in effect, the same thing to be done which appellant complains of, since the amount of the damages is then ascertained by the jury by the mere process of subtraction. And, this being so, we are unable to understand why the witness should not be permitted to state the result, as well as the facts from which such result is reached. In either case, the amount of the damages is ultimately based on the opinion of the witness. The distinction here insisted on between the two methods is based on mere form, rather than substance. The facts upon which the witness bases his opinion may be shown on cross-examination, and when this is done the jury have all the means which can be afforded for forming an independent judgment as to the damages. See *Texas & St. L. R. Co. v. Kirby*, 44 Ark. 103; *Hayes v. Ottawa, O. & F. R. V. R. Co.*, 54 Ill. 373; *Spear v. Drainage Com'rs*, 113 Ill. 632; *Snow v. Boston & M. R. Co.*, 65 Me. 230; *Swan v. Middlesex Co.*, 101 Mass. 173; *Sherman v. St. Paul, M. & M. R. Co.*, 30 Minn. 227, 10 Am. & Eng. R. Cas. 193; *Portland v. Kamm*, 10 Or. 283; *Pittsburg & L. E. R. Co. v. Robinson*, 95 Pa. St. 426, 1 Am. & Eng. R. Cas. 468; *Washburn v. Milwaukee & L. W. R. Co.*, 59 Wis. 364, 20 Am. & Eng. R. Cas. 225; *Lewis Em. Dom.* § 436, 6 Am. & Eng. Enc. Law, 620, subd. "C." In *Seattle & M. R. Co. v. Murphine*, *supra*, this court held that the cost of new fencing made necessary by the construction of the road might be shown to aid the jury in ascertaining the extent of the burden thereby cast upon the land, but that the same should only be considered in so far as the land was thereby depreciated in value. On the authority of that case, the objection of appellant to the testimony as to the cost of additional fencing is not tenable." *Seattle & Montana R. Co. v. Gilchrist, et ux.*, (Wash. July 7, 1892,) 30 Pac. Rep. 738.

**Testimony as to Rental Value Admissible.**—On the question of damages for the appropriation of land by condemnation proceedings, upon cross-examination, the land owner who has testified to the value of the land taken and injuriously affected, and the uses to which it could be applied, may be asked as to its rental value, and the rents received by the owners from tenants occupying the same. *Minnesota Belt Line R. Transfer Co. v. Gluek*, 45 Minn. 463.

**Evidence of Previous Offers Inadmissible to Prove Value.**—Upon the question of damages for the appropriation of land in condemnation proceedings, evidence of the prices previously offered the land owner for the land taken is inadmissible; and the error in receiving it will be presumed to be prejudicial unless it is reasonably clear from the whole case that the finding or verdict could not have been influenced by it. *Minnesota Belt Line R. Transfer Co. v. Gluek*, 45 Minn. 463.

Evidence of an offer made to plaintiff for his property, prior to the construction of the railroad, is inadmissible in an action against a railroad company for damage done said property in the construction and operation of the road. *Hine v. Manhattan R. Co.* (New York April 26, 1892), 30 N. E. Rep. 985. The court said: "The general term of the fourth

department had the question before it in *Keller v. Paine*, 34 Hun, (N. Y.) 167, 177. And in discussing the question the court said: 'It has been intimated in some cases that offers are some evidence of value. But it is a class of evidence which it is much safer to reject than to receive. Its value depends upon too many circumstances. If evidence of offers is to be received, it will be important to know whether the offer was made in good faith, by a man of good judgment, acquainted with the value of the article, and of sufficient ability to pay; also whether the offer was cash, for credit, in exchange, and whether made with reference to the market value of the article, or to supply a particular need or to gratify a fancy. Private offers can be multiplied to any extent for the purpose of a cause, and the bad faith in which they were made would be difficult to prove.' The reasons thus assigned in support of the decision made we fully approve. That decision has been followed in *Leale v. Metropolitan El. R. Co.*, (Sup.) 16 N. Y. Supp. 419; *Lawrence v. Metropolitan El. R. Co.*, (Com. Pl. N. Y.), 8 N. Y. Supp. 326. The proposition has been asserted in *Ross v. Manhattan El. R. Co.*, (Super. N. Y.), 8 N. Y. Supp. 495; *Kuh v. Metropolitan El. R. Co.*, (Super. N. Y.) 9 N. Y. Supp. 710. It has also been applied to offers relating to personal property. *Young v. Atwood*, 5 Hun, (N. Y.) 234; *Linde v. Republic F. Ins. Co.*, 50 N. Y. Super. Ct. 362; *Weld v. Reilly*, 48 N. Y. Super. Ct. 531. It is so held in other jurisdictions. *Fowler v. County Com'rs of Middlesex*, 6 Allen (Mass.) 92-96; *Whitney v. Thatcher*, 117 Mass. 523-527; *Wood v. Firemen's F. Ins. Co.*, 126 Mass. 316-319; *Louisville, N. O. & T. R. Co. v. Ryan*, 64 Miss. 399-404; *St. Joseph & D. C. R. Co. v. Orr*, 8 Kan. 419-424. In the few cases which may be found holding the other way the question does not seem to have received much consideration from the courts rendering the decisions, and the absence of argument in their support renders unnecessary any special reference to them. Respondent's counsel insists that *Harrison v. Glover*, 72 N. Y. 451, is an authority against the position here approved; but we do not so read it. There the plaintiff employed the defendants to sell blankets at a price not less than the manufacturing corporation of D. & Co. marketed blankets of their manufacture. The question was, what did the parties intend by this contract? Did they intend to make the actual sales by D. & Co. of their blankets the test, or the price at which they held them? Judge ANDREWS said: 'It was competent for the parties to provide that the price of D. & Co.'s blankets, as ascertained by the actual sales, only, should govern the price of the plaintiff's blankets. But the parties did not understand this to be the meaning of the contract;' and this statement is followed by an argument on the part of the learned judge to show that the contract which the parties intended to make, and did, was that the defendant should be governed by sales, or by ascertained *bona fide* offers to sell. The discussion had reference solely to the test which the parties had established by their contract, and was not intended to and does not affect the question before us. While we agree with the general term in the view expressed touching the question so far considered, we cannot indorse the position taken that a reversal should not be had because such testimony did not affect the result. We do not well see how this court can ascertain or determine what weight it had. The question of value was sharply contested, and, if we cannot say that this testimony did not influence the decision of the court, the appellant is entitled to have its admission declared to constitute reversible error. The presumption necessarily arises from the situation presented by the evidence and the decision of the court that the evidence was considered, and it is strengthened by the fact that the trial court, after passing on the admissibility of the testimony, and listening to the answer of the witness, asked the plaintiff how long before the building of the road the offer of \$55,000 was made."

**Evidence as to Sales of Land in Vicinity of Land Taken.**—Where in condemnation proceedings the deed of a person not connected with the parties to the suit, conveying land in the vicinity of the land sought to be taken, was offered in evidence by appellant for the purpose of showing the value of the land to be taken, and not accompanied by evidence showing, or tending to show, that the sale was voluntary or in good faith, or that the lands so sold were similar in locality and character to the lands in question, *held*, that such deed was properly excluded from the evidence. The court said: "It is urged that the court erred in excluding a deed offered in evidence by appellant for the purpose of showing a sale of property in the locality of the premises sought to be condemned. The instrument offered purported to be a deed from one Gahan to Jefferys conveying lots 1 and 2 in Murray's subdivision of part of the S. fraction of the N. W. quarter section 28, township 39 N., range 14 E., of the third P. M. The property in dispute was lot 6, Healey's subdivision of lot 7, block 1, Canal Trustee's subdivision of section 29, in the same township and range. No evidence was offered showing, or tending to show, that the sale was voluntary or in good faith, or whether the premises were improved or not, or if improved, the nature and character of the improvements. Evidence of voluntary sales of other lands in the vicinity, and similarly situated, as affecting their value, is admissible in evidence to aid in estimating the value of the tract to be condemned. *St. Louis, V. & F. H. R. Co. v. Hal-ler*, 82 Ill. 211; *Chicago & W. I. R. Co. v. Maroney*, 95 Ill. 182, 5 Am. & Eng. R. Cas. 360. But it is incumbent on the party offering such proof to show that the lands so sold were similar in locality and character to the lands in question. *King v. Iowa Midland R. Co.*, 34 Iowa, 458; *Cummins v. Des Moines & St. L. R. Co.*, 63 Iowa, 397, 17 Am. & Eng. R. Cas. 26. While the jury may, under the statute, inspect the property sought to be taken for the designated public use, there is no warrant for their viewing other property mentioned in the evidence of the witnesses. It is manifest, therefore, that, to render the evidence competent, it should be accompanied by evidence or offer of evidence that will convey to the jury some intelligent idea of the relative value of the properties. If they are not similar in character, in location, and improvements, and no basis is furnished by which a comparison may be made, the evidence could not aid in fixing the value of the particular property. Moreover, the only purpose of introducing this deed was to prove the price of the lots therein mentioned, as tending to establish the value of the lot in controversy, and this was to be done solely by the consideration expressed in the deed. The recital of the consideration in the deed would, as between the parties to the deed, be admissible evidence as tending to show the amount paid; but even as between them it is not conclusive. As to strangers to the deed,—that is, those not parties to it, or in privity with the title,—the recital of consideration is an *ex parte* statement of the parties to the deed. It is, at most, an admission of the grantor and grantee in the deed, and therefore hearsay, when offered against a stranger to the deed. *Seefeld v. Chicago, M. & St. P. R. Co.*, 67 Wis. 97, 27 Am. & Eng. R. Cas. 428. The deed was properly excluded." *O'Hare v. Chicago, M. & N. R. Co.* (Ill., Oct. 31, 1891), 28 N. E. Rep. 923.

In ascertaining the value of land sought to be appropriated by a railroad for a right of way, evidence is admissible to show the price at which similar land, in or near the vicinity of the land taken, was sold at the time of the appropriation. The court said: "Upon the trial one Cardinell, a witness for the petitioner, testified that he had sold land similar in character to that of the respondents, and in the same vicinity, at about the time of the filing of the petition in this proceeding. The witness also testified that the land was nearer to the town of Stanwood than that of the respondents,

and that it was purchased for the purpose of being divided and platted into town lots. When asked the question, 'How much did you sell that land for per acre?' an objection was interposed by counsel for respondents, on the ground that it was incompetent, irrelevant, and immaterial. The objection was sustained, and an exception allowed. That action of the court is assigned as error. Whether, in determining the market value of a particular tract of land, it is proper to allow proof of the sale of similar property, at or near the time of the taking, is a question upon which the authorities are not at all harmonious. The market value of land, or other property, is the price it will bring when offered for sale in the ordinary way. Knowledge of value is generally derived from actual sales. Why, then, is it not competent to show sales of similar property in the same neighborhood, when made at or near the same time? The reason usually assigned for holding such testimony inadmissible, that it raises collateral inquiries which the jury should not be called upon to consider, is, to our minds, unsatisfactory. No witness is competent to testify as to a particular sale who is not personally cognizant of the fact, and, this being so, the character and situation of the land, and all the circumstances surrounding the transaction, may be brought out on the examination of such witness, thus enabling the jury, without difficulty, to determine whether or not such sale should be considered a fair criterion of value. Upon principle we can perceive no valid reason for rejecting such testimony, and we think the preponderance of authority is also in favor of its competency. See *Town of Cherokee v. Sioux City & I. F. Town Lot & Land Co.*, 52 Iowa, 279; *Culbertson & B. Packing & Provision Co. v. Chicago*, 111 Ill. 651; *Gardner v. Brookline*, 127 Mass. 358; *Sawyer v. City of Boston*, 144 Mass. 470; *March v. Portsmouth & C. R. Co.*, 19 N. H. 372; *Concord R. Co. v. Greely*, 23 N. H. 237; *Washburn v. Milwaukee & L. W. R. Co.*, 59 Wis. 364, 20 Am. & Eng. R. Cas. 225; *Roberts v. City of Boston*, 149 Mass. 346; *Hunt v. City of Boston*, 152 Mass. 168.

"The degree of similarity that must exist between the property sold and the property whose value is to be determined, as well as the nearest in respect to time and distance, are matters resting largely in the discretion of the trial judge. *Lewis, Em. Dom.* § 443; *Watson v. Milwaukee & M. R. Co.*, 57 Wis. 332, 10 Am. & Eng. R. Cas. 168. But still that discretion will, in proper cases, be reviewed by the appellate court; and in this instance, but for the fact that appellant could not have been prejudiced by the exclusion of the testimony offered, we would be inclined to criticise the ruling of the court. The same witness testified that he knew the market value of the land in question, and stated its value to the jury, and there was therefore no occasion, so far, at least, as that witness was concerned, for resorting to proof of specific sales of similar property, and appellant was in no wise injured by the ruling of the court.

"The ruling of the court rejecting the testimony of the witness Foster, as to what he testified was the value of McDonald's land adjoining that of the respondents, in a probate proceeding, in the same court, the day before, is not open to criticism. What the witness said or did on the day previous, and in another proceeding, was entirely immaterial. If he knew the market value of respondents' land, he could have so stated. If he did not know it, he was not competent to testify as to its value at all." *Seattle & Montana R. Co. v. Gilchrist et al.* (Wash. July 7, 1892) 30 Pac. Rep. 738.

**Evidence as to Increase in Value of Other Land Along the Road.**—In assessing damages for land taken by a railroad company for a right of way the question for the jury to determine is the value of the land at the time of the appropriation, and it is immaterial as affecting the question of damages that the market value of lands in other counties through which the railroad runs has increased in value "within the last six months."

The court said: "At the trial, counsel for appellant propounded to a witness this question: 'Has not the market value of real estate through Skagit and Snohomish counties, where the Seattle & Montana Railroad runs, increased within the last six months?' The question was objected to as irrelevant and immaterial, and the objection was sustained, and we think rightly. In a new country like this, values are likely to increase rapidly, even in localities remote from railroads. If counsel had offered to show to the court by proper proof that such enhancement of value was directly due to the proposed building of the road, and that such appreciation of value should therefore be excluded, the case would be different. But disconnected from anything, showing that the real market value of respondents' land, at the time of the taking, should not be considered in the assessment of damages, the question was clearly objectionable. As an independent proposition, it was quite immaterial whether or not the price of land through those counties had risen or fallen within six months. The value at the time of the appropriation was what the jury were to determine, and not the cause of that value." *Seattle & Montana R. Co. v. Gilchrist et al.* (Wash. July 7, 1892) 30 Pac. Rep. 738.

**Evidence as to Elements of Special Damage.**—Where, in condemnation proceedings, evidence of the value of the land taken for all purposes to which it was or might be devoted, was permitted to go to the jury, a defendant cannot complain, of evidence offered by the petitioner as to the value of the land per acre, on the ground that it was an attempt to prove the value of the land taken without regard to its special surroundings, or to the special uses to which it had been devoted. The court said: "It is objected that the court erred in permitting appellee to prove the value of the land taken, without regard to its special surroundings, or to the special uses to which it had been devoted by appellant. The objection is not well taken. The value of the land is an element always proper to be shown and considered, for any purpose to which it is or is susceptible of being devoted. It is undoubtedly true that evidence of its value as land merely, independently of the purposes to which it is or may be appropriately put, will not be of controlling importance. If the property has a special value for any cause, that special value belongs to the owner, and compensation must be made to him for the value of his land. It is the value which he has, and of which he is deprived, that must be made good to him. *Chicago & E. R. Co. v. Blake*, 116 Ill. 163, 24 Am. & Eng. R. Cas. 288; *St. Louis, J. & S. R. Co. v. Kirby*, 104 Ill. 345, 10 Am. & Eng. R. Cas. 214. It cannot, however, be doubted that evidence of the value of the land as such is competent evidence. But the recovery must, at least, be had upon the basis of the actual value taken from the owner. We see no objection to the question propounded by appellee's counsel as to what was the value of the land per acre. It may have afforded one means of determining the compensation to be paid, and in many cases, perhaps, the only one. But in this case appellant is in no condition to complain. The value of its land for all purposes to which it was or might be devoted, so far, at least, as counsel saw fit to investigate, was permitted to go to the jury." *Hercules Iron Works v. Elgin J. & E. R. Co.* (Ill. May 12, 1892) 30 N. E. Rep. 1050.

## BELLINGHAM BAY &amp; BRITISH COLUMBIA R. CO.

v.

STRAND *et ux.*

(Washington Supreme Court, May 12, 1892.)

**Eminent Domain—Right of Petitioner to Open and Close.**—In proceedings to condemn land for railroad purposes the statutes (Washington) make it incumbent upon the railroad company to establish the necessity of the taking, and the sum necessary to actually compensate the party whose property is taken, consequently the company has the right to open and close.

**Prospective Rights as Element of Damages—Shore Lands.**—In the condemnation of shore lands, no damages should be allowed for any prospective rights which may possibly be granted by the legislature in such lands below the line of ordinary high tide. Even though such rights would enure to the benefit of the corporation, they are too remote to constitute an element of damage in such proceedings.

**Right of Jury to View Premises.**—In proceedings to condemn land for railroad purposes, it is within the discretion of the trial court to allow the jury to view the premises.

APPEAL from Whatcom Superior Court. Condemnation proceedings.

*Door & Finch*, for appellant.

*Fairchild & Rawson*, for respondents.

HOYT, J.—This was a proceeding to condemn property for corporate uses, under the act of February 1, 1888. Upon the trial, petitioner claimed the right to open and close in the introduction of testimony and argument to the jury. The court refused to allow it so to do, and this refusal is assigned as error. Petitioner contends that, as this was a trial on appeal from the award of damages by commissioners, and as petitioner was the appellant, the question presented for the determination of the jury was as to whether or not the award of damages made by the commissioners could be reduced; and that it, as the appealing party, had the affirmative. It further contends that, if the trial in the district court was unaffected by the proceeding before the commissioners, so far as this question is concerned, still, under the provisions of our statute, the petitioner has the right to open and close. A discussion of the first proposition would be of no general value, for the reason that, under our present statute, a case in which the question could arise is no longer possible; and the conclusion to which we have come in regard to the other contention

Statement  
of case.

makes it unnecessary, for the purposes of this case, that we should decide it. We shall therefore discuss only the second question above suggested. Under our statute, which party is entitled to open and close? This question has been a much mooted one, and the authorities in regard thereto are absolutely irreconcilable. In some of the states, after a careful consideration, the courts have settled down in favor of one side of the proposition, while in others, after equally careful consideration, a directly opposite conclusion has been arrived at. The question is a new one here, and the construction of our own statute is directly involved. It therefore becomes our duty to investigate the same, not only in the light of the decisions of the courts of other states upon this particular question, but also in the light of established principles, as universally applied to the determination of questions of this nature.

It is conceded by the respondents that the general rule, as applied to questions of this kind, is that he who has the affirmative of the issue is entitled to open and close; that the party who will be defeated, if no proof were offered, has upon him the burden of proof, and, as a consequence of such burden, the right to open. All the cases which have sustained the right of the land owner to open and close have practically conceded the general rule as above stated, but have avoided the effect of the same by saying that, as the only question before the jury in this class of cases is as to the amount of damages, it follows that he who is claiming the damages must make proof thereof or be defeated. That this is true under statutes where the land owner is the moving party is unquestioned, and the reasoning of the courts upon that side of the question, as applied to that kind of a case, is entirely satisfactory to us. There the railroad already has the land, and no question of the taking of the same is involved. Many of the cases relied upon by respondents belong to this class, and with these we find no fault. A large number, however, which hold with the contention of respondents, are cases like the one at bar, where the corporation was the moving party; and it is this class of cases which it is impossible to harmonize with those upon the other side.

Upon principle, under our statute, who has the affirmative of this issue? What is it necessary that the corporation should establish before a decree of condemnation can be granted it? We think that it is incumbent upon the corporation to establish at least two things: *First*, the necessity of the taking; and, *second*, the sum necessary to actually compensate the party whose property is taken. No one would



contend that as to the first of these necessary requirements the petitioner does not have the affirmative, and to us it seems equally clear that the burden of proof should also be upon it to establish the second. The necessity for the taking having been established, the respondents contend that, in the absence of proof of damages, the petitioner would be entitled to a degree condemning the property to its use, with damages assessed against it in a nominal amount. If this contention is true, it would, of course, follow that the burden of proof upon this question of damages was upon the land owner, and he entitled to open and close. But we cannot subscribe to this doctrine at all. It never could have been the intention of the legislature to have thus placed the land owner at the mercy of circumstances. Under this rule, if in any case default should be made, the petitioner would get the property for nothing.

Nominal damages never purport to be real damages. They are awarded where, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show. But, in proceedings for the condemnation of land for corporate purposes, the constitution and statutes protect a land owner from a contingency of this kind. The land can only be taken upon the payment of the actual value, and the court, before it is justified in awarding a decree of condemnation, must find as a fact what the actual value of the property is. This it cannot do without proof. Under these provisions, the court would not be warranted in finding, from the fact that no proof was introduced upon the question of value or damages, that the property only had a nominal value, and that there were no resulting damages. If we are right in our view of the statute as above stated, it must necessarily follow that, in the absence of any proof as to damages, the petitioner would fail in its suit, and, if such would be the result of the want of any evidence upon this question, the universally conceded rule, as above stated, would give to the petitioner the right to open and close in regard to such question. The arguments in the opinions in that class of cases, holding that the petitioner has the affirmative of this issue, seem to us to be much more reasonable than those of the cases upon the other side. This latter class of cases do not seem to deny the general proposition that the party against whom judgment will be given, in the absence of proof, has the affirmative, but, by an ingenious course of reasoning, attempt to show that such rule is not applicable to cases of this kind, or announce the doctrine that the decree of condemnation would go with a judgment for nominal damages only. Their reasoning, however, as to the first

branch, is not satisfactory to us, and the second proposition is, as we have seen, entirely untenable under our statute.

In fact, we cannot see how it can be applied under any of the statutes, where the corporation, and not the land owner, is the moving party. The reasons in favor of the right of petitioner to open and close, and the conclusions of the court upon this question, are so ably and tersely stated by Mr. Justice SHELDON in deciding the case of *McReynolds v. Burlington & O. R. R. Co.*, 106 Ill. 152, 14 Am. & Eng. R. Cas. 172, that we see no escape from such reasoning and conclusion. That learned judge in deciding said case, makes use of the following language: "Objection is taken to the refusal of the court below to permit the defendant's counsel, on his motion, to open and close the case before the jury. The decisions of courts are not uniform upon this question. The general rule, as laid down in Wharton on Evidence, § 357, is: 'It may be stated, as a test of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof, which he must satisfactorily sustain.' The present proceeding is not one by the land owner to have an assessment made of his damages or compensation for the taking of his land, but it is a proceeding instituted by the railroad company to ascertain what is a just compensation for the land sought to be appropriated.

By our state constitution, the land cannot be acquired without just compensation to the land owner, to be ascertained by a jury. The statute upon the subject contemplates that the jury are to ascertain the compensation, 'after hearing the proof offered.' Should there then be no proof offered, the petitioner would be defeated. It would fail of having an ascertainment by the jury upon proof offered of what was a just compensation for the land, without which it would be unable to acquire the land sought to be appropriated. Under the rule, then, that the party entitled to begin is he who would have a verdict against him if no evidence were given on either side, we think the court below properly ruled that the petitioner should open and close. This view is in agreement with the decision of the supreme court of Ohio upon this precise question, in the well-considered case of *Neff v. Cincinnati*, 32 Ohio St. 215, under the constitution and statute of that state, which we take to be similar to ours upon this subject." The conclusions of this case were expressly affirmed in the case of *South Park Com'rs v. Trustees of Schools*, 107 Ill. 489,

where Mr. Justice CRAIG, in delivering the opinion of the court, shows that the application of the universally accepted rules in regard to the burden of proof, and the consequent right to open and close, when applied to cases of this kind, will cast upon the corporation the burden of proof, and give it the right to open and close whenever it is the moving party, but that the contrary rule might well be held to obtain where the proceeding was one by the land owner affirming the taking of the property by the corporation, and seeking only a judgment for damages. These cases and others upon the same side, referred to by appellant, so well agree with our own ideas of the proper construction of our statute that we feel compelled to decide in accordance therewith.

But, as against the reasoning of these cases, it is suggested upon argument by respondents that, under our statutes, the adjudication as to the necessity of the taking is a separate proceeding, and that the only question to be determined upon the trial before the jury is the amount of damages, and that for that reason the land owner should be held to have the affirmative in such trial. In regard to this contention we would say that our statute in that regard is not unlike those passed upon by the supreme court of the state of Illinois, above cited. The fact that petitioner has to first establish one of the facts necessary to its success in procuring the object for which its petition was filed at one time, and the other necessary fact at another time, cannot relieve it of the burden of establishing these necessary facts by its own affirmative case. The petitioner could have had no decree condemning the property to its use until the actual value of the property had been shown in evidence. Therefore it was error on the part of the trial court to hold that the affirmative was upon the land owners, and they entitled to open and close.

Another error relied upon by appellant is that the verdict was excessive, and that the court erred in not granting its motion for a new trial on that ground. Its first position on this question is that as it alone appealed from the award of damages by the commissioners, the respondents could get no benefit from such appeal; from which it would follow that no verdict in excess of \$8,500, the amount of the award of said commissioners, could be sustained. Appellant makes an ingenious argument in support of this position, but we are not satisfied that it should obtain. The statute is not as clear upon this subject as it should be, but it seems to contemplate a new trial as to the amount of damages which should be awarded. As this statute is no longer in force, this question is of little importance, and we shall not further discuss it.

Appellant further contends that the amount of damages awarded, is greatly in excess of the sum warranted by the proofs. In this regard it is not claimed that there was no testimony in the case which would warrant the verdict rendered. The contention is that all, or nearly all, of the witnesses that testified as to the value of the property taken were allowed by the court to include in their estimate of said value certain prospective rights to the lands below the line of ordinary high tide in the waters of Puget sound. That the witnesses were allowed so to do is clear from the record, and we must therefore decide whether or not this prospective contingent right was a proper element to be taken into consideration in determining the value of the property taken. We think that it was not. At the time these proceedings were instituted there was no law in force giving to the littoral proprietor any rights whatever in said tide lands, and, under the decisions of this court in regard to the rights of littoral proprietors in such lands, the respondents had no valuable rights therein. It was left entirely to the legislature to say whether or not they should have any recognition as such littoral proprietors. Under these circumstances, any value which was placed upon the property taken, by reason of any rights which might or might not be bestowed upon it by legislation, was too remote to constitute an element of value in proceedings of this kind; and, even if they were held not to be too remote to constitute an element of damage, there is much force in the argument of appellant that, by the taking of the property for corporate uses, the right attaching to the same would not thereafter enure to the benefit of such corporation.

Evidence of  
prospective  
rights.

It is true our statute seems to warrant the condemnation of the entire title to the property, but the corporation can only take such title for corporate purposes. Hence it does not follow that, as incident to the title thus passed for corporate purposes, such corporation succeeds to all the rights of the littoral proprietor. Respondents, while seeking to show that the elements of damage testified to by their witnesses were proper ones to be taken into consideration, attempt further to meet the objections thereto by the claim that, although the witnesses may have testified to something in regard to these riparian or littoral rights, yet that their testimony, taken as a whole, showed that they only estimated the lots at the market value as they were then situated.

The testimony of some of the witnesses would seem to justify this contention, but we are not satisfied that every witness on the part of the respondents based his estimate of value entirely upon what the property would bring in the

market at the time of the condemnation; and even if this did appear from the testimony of all the witnesses, yet all this testimony, as to the appurtenances to the property taken, was incompetent, and of such a nature that it would manifestly tend to mislead the jury. A verdict rendered thereon could not stand unless it clearly appeared that the party against whom the verdict was rendered was not at all prejudiced by such testimony, and, as this fact does not appear to our satisfaction in the record in this case, it follows that the verdict should have been set aside.

Appellant further contends that it was error to allow the jury to view the premises. We think, however, that this was a matter within the discretion of the trial court, and that no abuse of such discretion is shown by the record.

Several other errors are assigned as ground for the reversal of the judgment, but they are most of them simply branches of the questions which we have discussed above, and the others are not of sufficient importance to require separate consideration.

Judgment of the court below must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

ANDERS, C. J., and STILES and SCOTT, JJ., concur. DUNBAR, J., not sitting.

**Eminent Domain—Right to Open and Close in Condemnation Proceedings.**—See note, 47 Am. & Eng. R. Cas. 270; Colorado Cent. R. Co. v. Allen (Colo.) 44 *Id.* 193; note, 23 *Id.* 126, and cases there cited; Streyer v. Georgia, S. & F. R. Co. *post.*

In condemnation proceedings under Washington Laws 1889-90, p. 294, the burden of establishing the value of land taken for railroad purposes is on the company making the appropriation, and it therefore has the right to open and close; and the mere fact that the owner of the land sought to be taken, filed a pleading purporting to be an answer, which was not required by law, stating what he claimed to be the value of the land, and the manner and extent of the injury by the proposed appropriation, does not shift the burden of showing the value of the land upon him. The court said: "At the beginning of the trial both the petitioner and the respondents claimed the right to open and close the case. The court decided in favor of the respondents, and that decision of the court is assigned as error. Upon the question whether, in cases of this character, the petitioner has the right to open and close, the decisions of the courts of the various states are not uniform. Where not controlled by statute, the courts all base their decisions on the general principle that the party on whom rests the burden of proof is entitled to begin and reply. The majority of the cases seem to hold that the burden of proof is upon the land owner, and consequently give the opening and closing to him. In this state no private property can be taken or damaged for public or private use without just compensation being first made or paid into court

for the owner, and no right of way can be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation must be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Sec. 16, art. 1, Const. The proceeding must be inaugurated by the party seeking to appropriate the land. This is done by presenting to the superior court of the county in which the land is situated, or to the judge of such superior court in any county where he has jurisdiction or is holding court, a petition describing the land and premises sought to be appropriated with reasonable certainty, and setting forth the name of each and every owner or other party interested in the same, so far as the same can be ascertained from the public records, and the object for which the land is wanted, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money to all persons interested, irrespective of any benefit from any improvement proposed by such corporation; or, if a jury be waived, then that the compensation to be made be ascertained and determined by the court or judge thereof. Notice is given to the owner and other parties interested in the premises sought to be appropriated of the time and place when and where the petition will be presented to the court or judge; and at the hearing of the petition, if the court is satisfied that the contemplated use for which the land is sought to be appropriated is a public use, and that the public interest requires the prosecution of such enterprise, and that the land sought to be appropriated is necessary for the purposes of such enterprise, a jury is summoned, by order of the court, to assess the damages. Laws 1889-90, p. 294.

"From the above provisions of the statute it will be seen that the corporation seeking the condemnation of land for its corporate uses is required to bring the land owner into court in a certain prescribed manner, and to show that the use for which the land sought to be appropriated is a public use, that the public interests require the prosecution of the enterprise in which it is engaged, and that the land sought to be appropriated is necessary for the purposes of such enterprise. As to all of these matters, the burden of proof is, of course, upon the petitioner. Having gone thus far, and having come to the question of the amount of damages, does the burden of proof shift to the land owner, or remain with the petitioner? Our statute provides that witnesses may be examined by either party to the proceedings, but no answer or plea is required to be filed to the petition, in any case. In contemplation of law, therefore, the amount to be paid is to be determined upon the petition alone, without formal pleadings or issues. No formal pleadings or issues being contemplated or required by the statute, in order, therefore, to determine which party ought to open and close, it is necessary to consider what is the substantial issue to be established, and on which party is imposed the burden of establishing it. The substantial fact to be determined, in this class of cases, is not whether the compensation is more than the petitioner concedes to be just, or is willing to pay, as some of the cases would seem to hold, nor whether the compensation to be made is less than the owner of the land is willing to receive, but simply what is full compensation. The question of damages cannot be tried upon the claim or demand of the land owner. The proceeding is not an action by him to recover damages for land actually taken, but is a proceeding instituted by the petitioner to ascertain what is a full compensation for the taking or injuriously affecting the land; and, before the land can be taken at all, the petitioner must proceed affirmatively, and have the amount of compensation ascertained and deter-

mined' according to law, or not succeed in the appropriation. If no proof should be offered, the petitioner would be defeated, and the proceeding would be dismissed. And, this being so, the petitioner had the right to begin and reply, both in the introduction of evidence and in the argument to the jury. See 1 Whart. Ev. § 357; *Bellingham Bay & B. C. R. Co. v. Strand* (Wash.,) 30 Pac. Rep. 144, (recently decided by this court, but not yet officially reported); 1 Thomp. Trials, p. 238; *McReynolds v. Burlington & O. R. R. Co.*, 106 Ill. 152, 14 Am. & Eng. R. Cas. 172; *South Park Commissioners v. Trustees*, 107 Ill. 489; *Neff v. Cincinnati*, 32 Ohio St. 215; *Ft. Worth & R. G. R. Co. v. Culver* (Tex. App.) 14 S. W. Rep. 1013; *Alloway v. City of Nashville*, (Tenn.) 13 S. W. Rep. 123; *Montgomery Southern R. Co. v. Sayre*, 72 Ala. 443, 20 Am. & Eng. R. Cas. 203; *Harrison v. Young*, 9 Ga. 359.

"But it is contended, in this case, on behalf of the respondents, that an answer and reply were filed which raised an issue entitling the respondents to assume the burden of proof. It is true that a pleading purporting to be an answer was filed in the case, but it was not required by law, and alleged no fact which could not have been proved in its absence. It was a statement of what the respondents claimed to be the value and quantity of the land sought to be appropriated, together with certain other statements showing in what manner and to what extent they would be damaged by the proposed appropriation. It set up no affirmative defense to the proceedings, and did not deny anything alleged in the petition, except such matters as the court was called upon, *in limine*, to judicially determine. And we do not think, as claimed by counsel, that if respondents had failed to appear and give testimony at the trial, the court would have been warranted in directing a verdict for the amount stated in the reply to be the value of the land sought to be appropriated. We are of the opinion that, where there is a disagreement between the parties, and a jury is called to 'ascertain and determine' the compensation to which the land owner is entitled, the amount of such compensation must be shown by proof, and not inferred merely from what one party is willing to give or the other to take." *Seattle & M. R. Co. v. Murphine* (Wash., June 24, 1892.) 30 Pac. Rep. 720.

**Elements of Damage for Taking Land—Increased Cost of Cultivating Land.**—Where a railroad seeks a right of way over land adapted to cultivation, it is proper to consider, as an element of damages, the increased cost of cultivating it caused by the building of the road. The court said: "It is claimed by the appellant that the court erred in admitting evidence of the increased cost which might result from a system of irrigation upon some tracts, which would have to be adopted if the railroad were built, beyond that which would be suitable if the road was not built. The objection urged is that the land is uncultivated, and that no such system has yet been adopted, or is in contemplation of adoption. The land appears to have been unadapted to cultivation unless irrigated, and the damage caused by the building of the railroad would be increased if, by reason of such building, the owner was compelled to incur greater expense in its irrigation. Although then uncultivated, the land was shown to be adapted to cultivation. If so, the increase of any cost for bringing it under cultivation, caused by the building of the railroad through the land involved, would be a legitimate subject of inquiry, for the purpose of ascertaining the damage sustained by the owner." *San Bernardino & E. R. Co. v. Haven* (Cal., May 7, 1892.) 29 Pac. Rep. 875.

**Same—Fencing as a Distinct Item of Damages.**—In condemnation proceedings by a railroad company for a right of way the cost of building fences and constructing railroad crossings cannot be recovered as distinct items of damage but can be included in the damages resulting from the

depreciation in the value of the lands by reason of the taking, etc. *Seattle & M. R. Co. v. Murphine* (Wash. June 24, 1892) 30 Pac. Rep. 720. The court said: "Appellant contends that the court erred in permitting witnesses to testify as to the cost of building fences along the line of the right of way, and of a wagon crossing over the same, and in its instructions to the jury in regard thereto. The instructions complained of are as follows: 'Now, on the question of building a fence, if you find that it would be necessary for respondents or defendants in this case, in order to continue using this land for the purpose to which it is devoted now, for them to have a fence along the track, or on both sides of the track, then you will allow him whatever it is reasonably worth to put up a substantial fence along either or both sides of the track, as the testimony has shown.' 'And, further, if you find from the evidence that it is necessary for respondents to have a railroad crossing across the track and right of way of the railroad, and that it is necessary for them to have this for use for the purposes for which the land is devoted, then you will say how much it will take to build a substantial crossing, and, in case that fact has not been established, you can allow a reasonable amount for the building of such a crossing, if you find such crossing is necessary.'

"While the first of these instructions of the learned judge is not unsupported by authority, we nevertheless think it is justly open to criticism, and should not have been given. The amount of damages the owner of the land is entitled to recover is the market value of the land actually taken, irrespective of any benefit from any proposed improvement, together with any depreciation in the market value of the remainder caused by the taking of the right of way. If, by reason of such taking, additional fencing is made necessary, in order that the residue of the land may be conveniently used as the owner may desire to use it, the burden of constructing such fence, in so far as it depreciates the market value of the land is a proper element to be considered in estimating the damages. *Lewis Em. Dom.* § 498. The damages should be estimated in respect to the land, as land, and whatever casts a burden upon it, and thereby detracts from its market value, should be taken into consideration. The cost of necessary fencing and crossings may be shown to aid the jury in determining the extent of the burden thereby imposed upon the land. *Lewis Em. Dom.* § 498; *Stone v. Heath*, 135 Mass. 561. But as it is not certain in all cases, and perhaps not in any case, that the land will be depreciated in value in the exact proportion to the cost of fencing and crossings, no specific sum should be allowed for fences or crossings as distinct items of damage, but the allowance should be made only to the extent of the depreciation of the value of the land. See *Lewis Em. Dom.* § 498; *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288; *Kennedy v. Dubuque & P. R. Co.*, 2 Iowa, 521; *Hanrahan v. Fox*, 47 Iowa, 102; *Pennsylvania & N. Y. R. & Canal Co. v. Bunnell*, 81 Pa. St. 414; *Pittsburgh, B. & B. R. Co., v. McCloskey*, 110 Pa. St. 436, 23 Am. & Eng. R. Cas. 88; *Pittsburg, V. & C. R. Co. v. Vance*, 115 Pa. St. 325; *Curtin v. Nittany Valley R. Co.*, 135 Pa. St. 201, 44 Am. & Eng. R. Cas. 130. Under some circumstances, the value of the premises might be greatly enhanced by the building of a fence, and, in such cases, it would be manifestly unjust to compel the railroad company to build, or, which amounts to the same thing, pay for building it, in the absence of any statute requiring it to do so. The judge charged the jury, in effect, that the measure of damages would be the difference between the market value of the premises immediately before and after the appropriation of the right of way, irrespective of any benefits from the proposed improvement. He should then have told the jury that, in order to arrive at this difference in value, they might take into consideration the burden of increased fencing, in so far as the value of the land was thereby



depreciated, instead of charging them to allow whatever the evidence showed it was reasonably worth to put up a substantial fence along either or both sides of the track. The instruction respecting the crossing is especially objectionable, for the jury were thereby directed to find the reasonable cost of constructing a crossing if found to be necessary, even although the same had not been established by the evidence. The jury were not at liberty to determine that or any other question upon mere conjecture without proof."

The length of a strip of land sought to be condemned for railroad purposes was 1,001 feet, and the only evidence at the trial as to the cost of building a lawful fence along the tract bordering on the right of way was 30 cents per foot. *Held*, that the finding by the court that \$100 was sufficient to build such fence was contrary to the evidence. The court said: "The length of the right of way, or strip sought to be condemned through defendant's land, is 1,001 feet. The only evidence given at the trial as to the cost of building a lawful fence along this right of way, was 30 cents per foot. Of course the finding that it will cost \$100 is not sustained by the evidence, but is contrary thereto. By stipulation of the parties, the judge during the trial visited the premises for the purpose of making a personal inspection, and it is claimed that what he saw and learned by inspection is evidence in the case; that he may have seen that there were natural obstructions which would amount to a fence, or that under the circumstances no fence was necessary or even practicable, as the proposed roadbed was the wash of Arroyo Seco creek. To this suggestion it may be replied that it is not so found, and, if it had been, such finding would be inconsistent with the other testimony in the case; and, further, by finding that good and sufficient fences would cost \$100, the court concedes the necessity of a fence. It is also said that the defendant cannot complain, because it has been held that the assessment of the cost of fencing is made to enforce a duty imposed by law, and not as damages to the land owner for an injury to his land. *Butte Co. v. Boydston*, 64 Cal. 110; *California S. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 20 Am. & Eng. R. Cas. 309. But, if such be the case, it is the duty in which the land owner has a special interest, and, if the railroad company does not build the fence, the statute expressly authorizes him to collect the amount. And, on the other hand, the railroad company, by paying the amount assessed to the land owner, diminishes its responsibility, and renders the land owner liable for certain losses which may occur unless he builds and maintains the fence. Plainly, therefore, it is a matter in which the defendant has a substantial interest, and the error is prejudicial to her." *Los Angeles, P. & G. R. Co. v. Rumpff*, 94 Cal. 532.

In Missouri the statute imposes the cost of building fences and constructing gates at farm crossings on a railroad, upon the company, and this is not an item of damage in condemnation proceedings. *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557.

**Same—Loss of Crossing Under Railroad.**—Where an agreement executed by a railroad company as past consideration for the grant of a right of way, recites that the owner of the land shall be entitled to a free undercrossing under a bridge constructed by the company on her land, provided the bridge shall be "of sufficient dimensions to admit of said undercrossing, and further that the said company shall not be liable for any damage caused by reason of privileges being granted." *Held*, that where the bridge afforded a good crossing and subsequently the crossing was destroyed by the construction of a dam for a reservoir the loss thereof constituted a part of the damages which should be allowed in proceedings of condemnation for the reservoir. The court said: "This written agreement was not only a part of the consideration for the right of way, but it was part of the transac-

tion by which the defendant procured the right of way, and it should be read in connection with the deed executed by the defendant. It secured to defendant a valuable right, the loss of which, by the erection of the dam, constitutes a part of the damages which should be allowed to her in these proceedings. The point made that this agreement for a subway is a mere license, revocable at will, is not well taken. The company, as has been said, acquired the right of way subject to the agreement concerning the under-crossing." *Chicago S. F. & C. R. Co. v. Miller*, 106 Mo. 458.

**Same—Probability of Land being Included within City Limits.**—In ascertaining the market value of land in condemnation proceedings, the fact that provision has been made by law for bringing the land in question within the corporate limits of a city may be considered. *Duluth & W. R. Co. v. West*, (Minn. Oct. 27, 1892) 53 N. W. Rep. 197.

## GRAHAM

v.

## PITTSBURGH & LAKE ERIE R. CO.

(*Supreme Court of Pennsylvania, Nov. 9, 1891.*)

**Eminent Domain—Measure of Damages—Difference in Value.**—A railroad company, claiming title, constructed its road across plaintiff's farm on the line of an abandoned canal. Plaintiff subsequently brought an action of ejectment against defendant to settle the title to the strip of land occupied by the railroad and recovered judgment. *Held*, that the measure of damages for the taking of the land was the difference between the value of the entire farm at the time the company filed its statutory bond for the payment of damages in the condition the farm was in when first entered upon by the company and its value as affected by the existence of the road.

**Same—Estimating Damages.**—The value of the farm at the time of the company's entry upon it is not to be considered, in estimating such damages.

**APPEAL from Lawrence County Court of Common Pleas.**  
Action to assess damages for land taken for a right of way. Plaintiff obtained judgment for \$180 damages and he appeals. Appellant's first assignment of error was as follows: "(1) The court erred in refusing plaintiff's offer and sustaining defendant's objection, which offer and objection, and the ruling of the court, are: 'Question. What did you consider the fair market value of your farm at the time this road was located and constructed, immediately afterwards and before?'" The railroad's bond for payment of damages was filed December 3, 1890.

*E. T. Kurtz and J. Norman Martin*, for appellant.

*D. B. & L. T. Kurtz*, for appellee.

**CLARK, J.**—The plaintiff is the owner of a tract of land in

Mahoning township, Lawrence county, through which formerly passed the Ohio & Pennsylvania Canal, Case stated. a small portion of his land lying between the canal and the Mahoning river. In 1873 the canal was abandoned, and in November, 1877, the Pittsburgh & Lake Erie Railroad Company, claiming to own the land occupied by the canal, entered and began the construction of their road, which was completed in the fall of 1878. About the year 1882 the Pittsburgh, Cleveland & Toledo Railroad Company purchased of the plaintiff, in fee, for railroad purposes, a strip of land, 60 feet in width, adjoining the land occupied by the defendant, and extending across the entire tract, and built their railroad thereon. The plaintiff subsequently brought an ejectment against the Pittsburgh & Lake Erie Railroad Company, the defendant, to settle the title to the strip occupied by their road, formerly covered by the canal, and recovered a judgment, thereby establishing the fact that the original entry by the defendant company for the construction of their road was a trespass upon the plaintiff's land. The subsequent maintenance of the road thereon was therefore a continuing trespass, until the right of way vested in the company, on the approval of their bond, on the 3d December, 1890. For redress of the injuries resulting from this invasion of the plaintiff's rights, he had, of course, his remedy by an action of trespass. *Borough of Harrisburgh v. Crangle*, 3 Watts & S. (Pa.) 460; *McClinton v. Pittsburgh Ft. W. & C. R. Co.*, 66 Pa. St. 404; *Dimmick v. Brodhead*, 75 Pa. St. 464. The effect of the subsequent statutory proceeding to assess damages was to divest the title as of the date of filing the bond. In the action of trespass, if one had been brought, the plaintiff would have been entitled to recover damages for the tortious entry, and for any injuries he suffered from that date until the title of the right of way was vested in the company, not as these injuries affected the value of the land, but the enjoyment of it: whereas, in the proceeding to assess damages under the statute, the measure of damages would be computed upon the value of the land, unaffected by the obstruction of the plaintiff's road, and its value as affected by it. The action of trespass is for the recovery of the damages accrued in the past, while the assessment under the statute is for the price of a permanent right or privilege to be enjoyed in the future; but that price must be settled upon a consideration of the value of the land at the time of its lawful appropriation, as it was, on the condition it was, before the railroad was constructed, and its value afterwards. This necessarily involves a knowledge and consideration of the condition of the land before the railroad was built, for although the damages are to

be computed as of the date of the divestiture of the plaintiff's title to the right of way, yet it is plain that the land must be valued in the first instance, free from the obstructions of the plaintiff's road, and in the condition in which the defendant company found it upon their first entry, (*Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28); for, as at the time of the filing of the bond the plaintiff had established his right to the property free from the obstruction of the railroad, he has a right to have the assessment made of the land in that state. The sale to the Pittsburgh, Cleveland & Toledo Railroad Company was, of course, made under stress of the conditions affecting the land at the time, and may have been for a much less consideration than would otherwise have been available; *non constat* that but for the appropriation of the defendant's right of way the sale of the adjacent strip would ever have been made, for, although the first appropriation was wrongful, it was of a manifestly permanent nature, and was capable of being perfected under the statute.

In estimating the injury done to the plaintiff in the taking of his land for right of way, the value of the land unaffected by the construction of the railroad, is necessarily referable to some previous condition, for the railroad, at the time of the filing of the bond, was in full operation. We must go back to the time of original entry, to ascertain the condition of the land upon which the value is to be computed, or of the date of the actual and lawful appropriation. What was the condition of the land when the railroad company first entered for the construction of the railroad? What was its value in that condition on the 3d December, 1890, unaffected by the railroad, and what its value as affected by the railroad? The difference would be the proper measure of damages. There is a class of cases in which the company has been held to have acquired such an entry as entitled it to a conditional verdict or decree, and an assessment of damages made, in execution of the company's right. In *Wheeling, P. & B. R. Co. v. Warrell*, 122 Pa. St. 613, the parties submitted the assessment of damages to certain persons named, who made an award, and, although the amount awarded had never been paid, yet this court held that "by the award, and the agreement on which it was founded," the company "exhibited an equity which properly reduced the judgment to a conditional one, and thus relieved the defendant from a total loss of its improvements." So in *Allegheny Valley R. Co. v. Colwell*, 15 Atl. Rep. 927, (decided at the October term, 1888, and not officially reported,) it was said: "But as Colwell was at least passively derelict in knowingly permitting the railroad company to

Measure of damages.

occupy and put its improvements on his land, we agree that it would be inequitable to allow the judgment to work a forfeiture of these improvements;" and execution was accordingly stayed, to enable the company to proceed under the statute. In *Oliver v. Pittsburgh V. & C. R. Co.*, 113 Pa. St. 408, 44 Am. & Eng. R. Cas. 175, where the entry was under a lease from the life tenant, and with the knowledge and acquiescence of the guardian of the person entitled in remainder, who saw the expenditures made in the construction of the road, it was held that the entry so made could not be treated as a trespass. "In all the cases, however, in which the entry was made with the knowledge and consent of the owner," says our Brother WILLIAMS in that case, "the action has been treated as equitable in character. The corporation, having been permitted to enter in advance of the ascertainment of damages, did not thereby lose its right to proceed in the usual manner to secure their adjustment through the courts, and the action of ejectment has been sustained as a means of quickening the action of the corporation in this regard. While the owner has not parted with his title by his own conveyance, or had it divested by proceedings under the statute, he has parted with the possession under circumstances, and permitted expenditures upon and use of the property, of such a character as to make it inequitable for him to resume the possession, or to defeat the right of the corporation to proceed under the statute, and add to its lawful possession a lawful title, by virtue of a compliance with its provisions."

In all such cases as we have cited, the assessment covers the entire damages, with like effect as if the bond was filed at the time of the original entry. The title of the railroad company, in such a case, comes, not through the proceeding to assess the damages, but through its original entry and appropriation of the right of way, with the consent or without the objection of the owner. *Lawrence's Appeal*, 78 Pa. St. 365. But in the case now under consideration the defendant entered, at the outset, under a contested claim to the land, in fee. The plaintiff brought an ejectment, and the title was held to be in him. The company was found to be a trespasser, and was answerable as a trespasser to the extent already stated. There was no equity exhibited, nor was any invoked, which would have justified a conditional judgment; the damages for right of way are therefore to be estimated according to the general rule established in such cases. The 2d, 3d, 4th, and 5th assignments of error are sustained. The offer embraced in the 1st assignment was not directed to the proper subject of inquiry, and was therefore not admissible.

The judgment is reversed, and a *venire facias de novo* awarded.

**Eminent Domain—Instructing Jury on Question of Damages.**—In proceedings by a railroad company to condemn lands for right of way, where the court instructed the jury that, "damages are recoverable by the owner of the land for such injuries as depreciate the value of the property, where, by taking a portion of it, the portion left is rendered less useful, \* \* \* and that they should take all such matters into consideration, so far as shown by the evidence, in estimating the amount to be awarded as compensation." *Held*, that the question of damage resulting from the taking of part of the defendant's property was fairly presented for the consideration of the jury. The court said: "It is practically conceded in argument that the instructions are abstractly correct, but it is insisted that under the facts of this case they were calculated to mislead the jury, in that the jury were instructed by them that in assessing compensation they were to take into consideration only the depreciation in market value of appellant's property; thereby excluding from their consideration, as it is said, the damages resulting to appellant by taking a part of the property, and the construction and operation of the railroad thereon, arising from the diminished powers of doing business, the hindrance and loss of business, and the increased expenses of operating appellant's plant by reason and in consequence of such taking and appropriation. The jury were fully instructed on the part of appellant, and upon every conceivable phase of the questions involved. By the seventh, given for it, the jury were told 'that, in cases of this kind, damages are recoverable by the owner of the land for such injuries as depreciate the value of the property, where, by taking a portion of it, the portion left is rendered less useful; in case of a corporate body, less capable of transacting its business; for such hindrance and inconvenience as occasion loss, or diminish and limit its capabilities to transact its business by decreasing its power to transact as much business, or by necessarily increasing the expense of what may be done, although not diminished.' The jury are then told they should take all such matters into consideration, so far as shown by the evidence, in estimating the amount to be awarded as compensation. And so with the sixth. They were told to take into consideration, not only the value of the land taken, but all facts shown by the evidence that contributed to produce damage; as that the land, a part of which is taken, is put in worse shape for use or for the purpose for which it was designed to be used; that some portions of it are more dangerous in consequence; the danger from fire; the inconvenience of access to the balance of the property not taken; increased inconvenience of ingress and egress to and from the property; 'and all other actual inconvenience and damages that property may sustain in its use, not only for the present, but for the future,' etc. Numerous other instructions going to the fullest extent were given at the instance of appellant. No good purpose will be served by an examination of the numerous instructions in detail. It is sufficient to say that appellant had the benefit of every principle to which it was entitled, and there is no necessary conflict between the instructions given for appellee and those given on its behalf. It is also insisted with great earnestness that the damages awarded are grossly inadequate. It is sufficient to say that there is evidence in the record warranting the finding of the jury. They, as well as the trial judge, had the benefit of seeing the witnesses and hearing them testify, and thereby had opportunities of judging of the weight and credit to be given to the testimony which we do not enjoy. The jury, moreover, had the benefit and

advantage of a personal view of the premises, with a right to consider what they there saw in connection with the evidence in the case, in determining the compensation to be awarded. In all such cases it has been always held that the finding should be clearly and palpably against the weight of evidence to justify an appellate court to interfere with the findings of fact." *Hercules Iron Works v. Elgin J. & E. R. Co.*, (Ill. May 12, 1892) 30 N. E. Rep. 1050.

Where, in an action to recover damages for injuries sustained from the existence and operation of a railroad, the court instructed the jury, that the plaintiff cannot recover for injury "suffered in common with the public at large." *Held*, not to be error, where the court afterwards instructs the jury that "if the property is rendered less valuable by the construction and operation of the road \* \* \* you will find for the plaintiff." *Ft. Worth & R. G. R. Co. v. Downie*, 82 Tex. 383.

Where a court instructed the jury that "such damages shall be assessed as will compensate for such depreciation in value if any of said property before and after the construction of defendant's road, caused by the same," this is equivalent to the court charging the jury, that, "in determining the amount of damages plaintiffs were entitled to, they might consider the value of the property before and immediately after the railway and other structures were erected and that the sum of depreciation so resulting may be given." *Ft. Worth & R. G. R. Co. v. Downie*, 82 Tex., 383.

**Same—Defining "Market Value."**—The "market value" means the fair value of the property as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained, nor its speculative value; not a value obtained from the necessities of another; nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale, when one party wanted to sell and the other to buy. *Kansas City, W. & N. W. R. Co. v. Fisher*, (Kan. June 11, 1892.) 30 Pac. Rep. 111.

**Incidental Damages to Other Land Disconnected With That Taken.**—When a railroad company has the right of eminent domain and cannot agree, as to terms of purchase, with the owners of land, it may, by virtue of Conn. Gen. St. §3464, apply to a justice of the Superior Court for the appointment of appraisers to "estimate all damages that may arise" from such taking, and that such appraisers "shall view the premises, and estimate such damage." In estimating these damages it is not to be presumed that damage done to other land of the same owner, distinct from and disconnected with the land taken, and occupied, should be included. *Longworth v. Meriden & W. R. Co.*, (Conn. Feb. 29, 1892.) 23 Atl. Rep. 827. The court said: "It is the claim of the defendant that Gen. St. § 3464, provides for the appointment of appraisers to estimate all damages that may arise to any person from the taking and occupation of real estate for railroad purposes; that under this statute, if appraisers had been appointed to estimate the plaintiffs' damages, they should have included in this award the damages caused by the raising of the bridge and road bed, as stated, they being, as the defendant claims, 'immediate, incidental damages, which all parties could foresee and understand,' and they further claim that the deed of the plaintiffs to the defendant was, in effect, a release and satisfaction of all the damages that could have been assessed by appraisers under the statute; that it took the place of an appraisal, and estops the plaintiffs from claiming any damages that might have been included in the appraisal, if one had been made. Let us see if this claim can be supported. The language of the statute relied upon (section 3464) is: 'When any railroad company shall have the right to take real estate for railroad purposes,

and cannot obtain it by agreement with the parties interested therein, it may apply to any judge of the superior court for the appointment of appraisers to estimate all damages that may arise to any person from the taking and occupation of such real estate for railroad purposes; and, further on, the same section provides that the appraisers appointed 'shall view the premises, and estimate such damage.' The first question, therefore, is whether damage to other land of the same owner, distinct from and disconnected with the land taken and occupied, caused by acts of the defendant not done on the land taken and occupied, though rendered necessary by reason of such occupation in the manner required, are, in contemplation of law, to be considered as arising from such taking and occupation.

"In *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294; *Nicholson v. New York & N. H. R. Co.*, 22 Conn. 74; and *Burritt v. City of New Haven*, 42 Conn. 174,—it was held that acts similar to those in question did not constitute a taking of land, but that the persons injured were entitled to damage in an action at law. The defendant claims these cases are not in point, since in none of them had damages been assessed or paid to the owners of the property injured, by the railroad company, on the construction of their road; nor had there been any deed or agreement of such owners. It is not urged, however, by the defendant, that these cases in any way sustain its contention; nor is such claim made as to any other case within this jurisdiction. And we think that they do afford some argument in support of the plaintiffs' claims; for while it is undoubtedly true, as admitted in *Imlay v. Union Branch R. Co.*, 26 Conn. 249-260, that, 'where land is taken, injury to the adjacent territory owned by the same proprietor is always to be considered by appraisers,' yet such a statement should not be construed to hold that where the land injured is neither taken nor injured by reason of its separation, nor by acts done upon the premises in fact taken, such damages are to be considered and included as damages occasioned by the taking. The defendant, however, relies upon the general doctrine of the decisions, as stated in *Lewis, Em. Dom.* § 565, and the authorities cited in its support, which is, in substance, that the damages must be assessed once for all, and that, when once assessed according to law, they include all the injuries resulting from the particular appropriation, and from the construction and operation of the works in a reasonable and proper manner, for all time to come, although the learned author himself severely criticises and condemns this rule. It may, at least, for the purpose of this case, be accepted without discussion, since, in considering its application, in section 568, the same writer says: 'The rule stated in the foregoing section applies only to damages from the construction of works upon the land to which the assessment relates. If parts of black acre and white acre are taken, and if the works, as constructed upon black acre, produce damages to white acre, then there is no presumption that these were included in the assessment to the proprietor of white acre, and he may recover therefor the same as though no land of his had been taken for the work.' And *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504, and also *Delaware Canal Co. v. Lee*, 22 N. J. Law, 243, are cited. The case *In re New York, W. S. & B. R. Co.*, 101 N. Y. 685, 25 Am. & Eng. R. Cas. 198, cited by the plaintiffs, is also in point, and we think these authorities abundantly sustain the position of the plaintiffs; and, in accordance with the principles therein contained, we hold that an appraisal of damages under Gen. St. § 3464, for the taking and occupation of the real estate which was in fact conveyed by the plaintiffs to the defendant, would not have presumptively included such injuries to other and detached land as those of which the plaintiffs complain. This conclusion renders it unnecessary to consider the further contention of the defendant as to the effect of the deed, since, of course, it is not and could not be, contended that it would have a



more extended scope than the appraisal. There is error in the judgment complained of, and it is reversed."

**Damages Where Land Is Already Intersected by Railroads.**—Where a railroad is constructed through a large tract of land through which other railroads run, it is proper to admit evidence as to what effect such railroad will have upon the value of the portions of land lying beyond the other railroads. The court said: "We are not disposed to adopt as correct the contention of the appellant that the mere establishment of a line of railroad across a tract of land so effectually and completely divorces the several tracts that the law will declare that they can no longer constitute parts of one entire farm. The right acquired by a railroad company by the appropriation of a right of way under the statute is a mere easement. *Quick v. Taylor*, 113 Ind. 540; *Cincinnati, I., St. L. & C. R. Co. v. Geisel*, 119 Ind. 77. The mere imposition of a public easement upon and over a body of land does not, of itself, operate to divide it into separate farms. *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500-515, (Gil. 433.) The fact that parts of a farm are separated by a road or a canal will not affect the question if such parts are in fact used together. Note to *Winona & St. P. R. Co. v. Waldron*, 88 Am. Dec. 100-119, and cases there cited. The true rule in the assessment of damages for right of way is that, where the lands affected are parts of one farm, lying in one compact body, or, although composed of separate and distinct tracts or government subdivisions, the separate tracts or subdivisions lie contiguous to each other, are owned by one person, and are used together as comprising one farm, whatever may be its size, damages should be considered and assessed for the entire farm. This is true whether the lands are all described in the articles of appropriation or not. The company, asking the appropriation of the right of way, is bound to take notice of the whole tract, and be prepared to meet a claim for damages to the whole. *Minnesota Valley R. Co. v. Doran*, 15 Minn. 230, (Gil. 179;) *Hartshorn v. Burlington, C. R. & N. R. Co.*, 52 Iowa, 613; *Atchison & N. R. Co. v. Gough*, 29 Kan. 94, 10 Am. & Eng. R. Cas. 151; *Winona & St. P. R. Co. v. Denman*, 10 Minn. 267, (Gil. 208;) *Wilmes v. Minneapolis & N. W. R. Co.*, 29 Minn. 242, 10 Am. & Eng. R. Cas. 161; *Welch v. Milwaukee & St. P. R. Co.*, 27 Wis. 108; *Bigelow v. West Wisconsin R. Co.*, *Id.* 478; *Riesner v. Atchison Union Depot & R. Co.*, 27 Kan. 382, 10 Am. & Eng. R. Cas. 155; *Kansas City E. & S. R. Co. v. Merrill*, 25 Kan. 421, 2 Am. & Eng. R. Cas. 485; *Elliott, Roads & S.* 190, and authorities cited in note 2. Whether the several tracts or subdivisions do lie contiguous to each other, and are in fact used together as one farm, is a question of fact to be determined by the jury from the evidence. *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500, (Gil. 433.) In our opinion, the court did not err in admitting the testimony. This is the only question presented and argued." *Chicago & W. M. R. Co. v. Huncheon*, (Ind., March 11, 1892,) 30 N. E. Rep. 636.

**Compensation Based on Different Uses of the Land.**—In proceedings in condemnation the land owner is not entitled to receive compensation for the land actually taken, equal to its market value for a use or purpose wholly distinct and disconnected from the use and purpose to which the remainder of his land is applied, and at the same time receive compensation for damages which he claims result to the remainder by reason of the taking. The court said: "Respondent's proofs were specially directed towards showing that the tract of land sought to be condemned was very valuable as a gravel pit, and that its greatest value was for use as such pit. The jury would have been justified by the testimony in concluding that it could be used more advantageously for such a purpose than for any other, and that its greatest value was for the gravel therein contained. If the jury so concluded, they could take the proofs in respect to its value

for this special purpose as a basis for determining the amount to be awarded the respondent as compensation, and the court so charged. It went beyond this, and, in effect, charged that to this amount the jury might add such sum as the testimony showed the taking of the premises in question had injured and depreciated the remainder of respondent's farm. And on appeal respondent's counsel contend that this was a correct exposition of the law; that their client was not only entitled to receive compensation for the acres actually taken, equal to their market value for any special or distinct purpose to which they might be applied, but that, in addition, he was entitled to be compensated for such damages as resulted to the residue of his farm by reason of the taking. Or, to put it differently, that the respondent, because to his advantage, might practically set apart this tract from the remainder of his farm by devoting it to a purpose distinct from and foreign to that of farming, and for such purpose have it valued, and then insist upon having it regarded as part of the farm, that his damages might be increased. If the land under consideration was of greater value as a gravel pit, or, to illustrate, for an elevator or hotel site, than it was for agricultural purposes, the owner could so insist when the railway company attempted its appropriation. But this increased value attached solely because the tract was adapted to and capable of separate and independent use, and this use contemplated and required its segregation from the balance of the farm,—its appropriation to an extraneous, more desirable, and hence more valuable purpose. If by using the  $8\frac{1}{2}$  acres as a gravel pit, or as a building site,—other than for farm buildings,—its value could be augmented, the respondent's compensation would be correspondingly increased, because it was his right to have his damages assessed on that basis, but he cannot be permitted to treat it as a separate and disconnected tract of land exclusively devoted to a special use and purpose distinct from farming, and at the same time regard it as a part of his farm,—as still connected with his adjacent farming lands. Assessing the damages by taking the value of the entire tract as a gravel pit, which of course assumed its separation from the remainder of respondent's land, and also assessing the damages by reason of its separation, was to some extent duplicating the damages." *Cameron v. Chicago, M. & St. P. R. Co.*, (Minn., Oct. 17, 1892,) 53 N. W. Rep. 199.

**Damage to Contiguous Property.**—In *Ft. Worth & R. G. R. Co. v. Downie*, 82 Tex. 383, the court held that damages should be recovered for the existence and operation of a railway switch and coal bins, in close proximity to one's lot, although they do not occupy the street upon which the lot abuts, or in any way disturb ingress or egress to and from the same. Following *Gainesville, H. & W. R. Co. v. Hall*, 78 Tex. 169, 44 Am. & Eng. R. Cas. 51.

Where several contiguous town lots are used and treated by the owner as one property in estimating his damages occasioned by the appropriation by a railroad company of one of such lots and parts of two others for its right of way, the injury to the entire property should be considered, although the petition filed by the railroad company for the appointment of commissioners only describes the lots across which the road is located. *Atchison & N. R. Co. v. Boerner*, (Neb., March 16, 1892,) 51 N. W. Rep. 842.

**Damage to Adjacent Land—Consequential Damages.**—In an action for damages by a railroad company against a city for taking some three acres of plaintiff's land, valuable by reason of large quantities of gravel therein, the plaintiff was permitted to show the damage to its adjacent land, but was not allowed to show damages to its plant as a whole, on the ground that the gravel pit bore no such relation to the entire railroad that its severance would occasion any consequential damages. The court said:

"The petitioner was allowed to show the damages to its adjacent land, access to which was over the part taken, and forming substantially one parcel with it; but was not allowed to show or recover damages to its plant as a whole. To have done so would have involved the question of the value of the whole of the petitioner's road before and after the taking, and, under the circumstances of the case, would clearly have been absurd. It is plain that the land taken and the adjacent remaining parcel injured bore no such integral and substantial relation to the whole railroad that their severance from it would occasion any consequential damage. The taking of a terminal station, or of some connecting line, or of an integral and important portion of the road, which could not readily be replaced, and the loss of which would sensibly interfere with the successful operation of the whole, would support a claim for damages to the plant; but the loss of less than three acres of land, outside of the location, and adapted for railroad use only as a gravel pit or track yard, would clearly be measured by the value of the land taken and the diminution in value of the rest of the parcel. The statute under which the city acted contained no specific authority to take property already devoted to public use. By instituting these proceedings rather than a bill in equity or an action of tort, the petitioner admits that its true position is that of an ordinary land owner, and not that of a *quasi* public corporation, whose means of serving the public have been impaired so as to affect the value of its whole plant. The court was therefore right in refusing to allow the jury to allow damages to the whole plant, and in excluding evidence which tended only to prove such damages." *Providence & W. R. Co. v. City of Worcester*, 155 Mass. 35.

**Damages for Closing Street by Construction of Railroad.**—Where a railroad company constructs its road across plaintiff's real estate, and permanently obstructs a public street upon which the property abuts at a distance of several hundred feet from the premises, the owner may maintain a suit at law for the damages sustained by reason of the closing of the street. The court said: "That defendant in error was entitled to compensation for the depreciation in the value of his property occasioned by the closing of the street, there is no room for doubt. *Gottschalk v. Chicago, B. & Q. R. Co.*, 14 Neb. 550, 14 Am. & Eng. R. Cas. 157; *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123, 20 Am. & Eng. R. Cas. 60; *Omaha & R. V. R. Co. v. Rogers*, 16 Neb. 117, 20 Am. & Eng. R. Cas. 79; *Chicago K. & N. R. Co. v. Hazels*, 26 Neb. 364. The question presented is whether an abutting lot owner may, by an action at law, recover damages for the interference with his easement in a street by a railroad company, where a portion of his property abutting thereon has been appropriated by the corporation for purposes of right of way. That such an action may be maintained when no part of the plaintiff's property has been appropriated to the use of the company, but is injured by the permanent interference with his easement in the street upon which his real estate abuts, is no longer an open question. The doctrine is sustained by the decisions of this court. *Burlington & M. R. R. Co. v. Reinhackle*, 15 Neb. 279, 14 Am. & Eng. R. Cas. 169; *Republican Valley R. Co. v. Fellers*, 16 Neb. 169, 20 Am. & Eng. R. Cas. 256; *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123, 20 Am. & Eng. R. Cas. 60; *Omaha & N. P. R. Co. v. Janeczek*, 30 Neb. 276. Likewise it has been held by this court that in condemnation proceedings it is proper to consider as an element of damages the depreciation in value of his property resulting from the construction of a railroad across a public highway adjoining the premises. *Sioux City & P. R. Co. v. Weimer*, 16 Neb. 272, 20 Am. & Eng. R. Cas. 184. That was an appeal from the assessment of damages returned by commissioners for the location of a railroad across the defendant's land. The

railroad track crossed a public road 37 feet below the level of the highway. The defendant, over the objection of the plaintiff, introduced testimony on the trial in the district court 'as to the situation of the land, as to abruptness and descents in connection with which the necessary cutting down and grading of the bed of the highway would render a portion of the land inaccessible to said highway.' This court was asked to reverse the case because of the admission of this testimony. The objection was overruled. In passing upon the question the court, in the opinion say: 'The railroad company, having acquired the right of way over defendant's land, must be presumed to intend to cut down its roadbed according to the plan and profile as testified to by its engineer, in which case, as I understand the law, it would be its duty to also cut down and grade the highway, so as to give it a proper gradient for the passage of vehicles. And if, by reason of the peculiar situation and topography of her land, such cutting down of the highway would be an additional damage to the land, I know of no reason why it should not be allowed to her; but, on the contrary, I think that the provision of the constitution, as well as considerations of justice, would give it to her. Hence, any proper testimony was admissible for the purpose of enabling the jury to ascertain the fact and extent of such damage.' We do not question the soundness of the authority to which we have just referred, but it is not applicable here, for the reason that it is predicated upon the facts materially different from those disclosed by the record before us. In that case the interference with the highway was immediately in front of the plaintiff's property, which rendered a portion thereof inaccessible to the highway; while in the case we are considering the point where the street was closed was more than 1,000 feet from Boerner's premises, and the injury thereby sustained, if any, was so far separate and distinct from that resulting from the taking of a portion of his lots as to permit him to bring this action. There is no presumption that such question was litigated in the condemnation case, nor is there anything in the record to warrant an inference that such matter was therein adjudicated. Nor is there any testimony from which it can be determined what damage, if any, defendant in error sustained on account of the closing of Commercial street. As previously stated, the testimony related to the depreciation in value of the property by reason of the construction and operation of the road over the lots, instead of being confined to the matter of closing the street. The judgment of the district court is reversed, and the cause remanded for further proceedings." *Atchison & N. R. Co. v. Boerner* (Neb. March 16, 1892) 51 N. W. Rep. 842.

**Overflow Caused by Railroad Embankments.**—In an action for damages against a railroad company for an overflow of plaintiff's land, evidence was offered that an embankment made by the railroad company prevented the water from passing off of plaintiff's land as it formerly did, although considerable openings were left in it for that purpose. *Held*, that the evidence was sufficient to sustain a judgment for the plaintiff. The court said: "It is urged that the court erred in finding, under the evidence, that the injury of which appellee complained was caused by the improper construction of appellant's railway. The statement of facts has much the appearance of a stenographic report, and makes reference to maps showing the situation of appellant railway and the land of appellee, to which the witnesses in their testimony referred; but these maps are not found in the record, and it is for this reason difficult to understand the full force of some of the evidence, but enough does appear to show that there was evidence tending to prove that appellee's land was situated both above and below the line of appellant's railway, and that this, in passing through the land, crossed the streams, distant from

each other some 270 yards; that the eastern bank of one and the western bank of the other were so high that, but for the embankment between them, made for support of the railway, water would pass over the ground between them during high water without overflowing the eastern bank of the one or the western bank of the other,—the intervening ground being low,—but that on account of the embankment between the streams the water could not pass off, as it had before done, and was piled up above the embankment until it went over the banks above the bridges across the streams, and flowed across the roadway or through cuts made by the railway company upon appellee's land which was shown to be higher at the banks referred to than it was between them and the outlying hills. It is true that it was shown that considerable openings were left at each of the bridges, but it was shown with equal certainty that these were not sufficiently large to permit the water to flow as it had done theretofore." *Texas & P. R. Co. v. Snyder* (Tex. Nov. 13, 1891,) 18 S. W. Rep. 559.

**Damage for Construction and Operation of Additional Tracks.**—Where a railroad constructed and maintained new tracks in addition to those already in use, in front of plaintiff's premises, the damages to be awarded against the railroad company should not be estimated either by their numerical proportion to the old ones, or the comparative use of them, but should be estimated from the opinions of witnesses expressed in a general way as to the amount of damages occasioned by the new tracks, and a verdict founded on such opinions will not be set aside. The court said: "It is not easy to prescribe a rule by which it may be determined how much of the damage was occasioned by the construction of the old tracks, and how much by the new ones. We are not satisfied that it is entirely correct to apportion it according to the number of tracks or by the use made of them. No witness has testified, and we are unable to conclude, that if there were three old tracks used, and three new ones were constructed, the three new ones would do no more than to double the nuisance; or, in other words, that only half of the damage occurring after that time could be attributed to them; nor are we any better able to determine from the evidence how the fact of an increase of the business of the road would necessarily add to the injuries complained of by the plaintiff. It may be that, if the new tracks had not been constructed, facilities for storing cars and for additional switching would have been made elsewhere, and that it would not have been found necessary or convenient to magnify the injuries of which the appellee complains. We mean only by these suggestions to express our want of satisfaction with the demand that plaintiff's evidence shall be confined to an exact statement of the proportion of damage resulting from the construction of the new tracks, measured either by their numerical proportion to the old ones or the comparative use of them. If this test is to be applied, there are some expressions in the former opinion that are not strictly accurate. We think that the evidence shows that there was a less number of the new tracks and more of the old ones than there stated. The evidence was that plaintiff's property, before its injury, was worth \$6,000, and there was some evidence that it was injured one-half by reason of the construction of the new tracks. It is true that upon further examination, and under the application of the test that the damage must be apportioned between all of the tracks in proportion to their number and use, the witnesses by whom this proof was made qualified and seriously impaired their testimony; and, when viewed in that aspect, it becomes difficult to assert that the record contains any evidence worthy of credence of the full amount of damage given by the verdict. If, however, the evidence is not submitted to the test referred to, and the witnesses are left to express their opinions in a general way as to how much of the damage was occasioned by the new tracks, the evidence not only supports the

verdict, but it would have warranted one for a greater amount. If we could see that by the test applied any certain result could be truthfully reached, we would approve its use. While we might not have reached the same conclusion that the jury did, as an original question, we are not satisfied that their verdict is so unsupported by the evidence as to make it our duty to set it aside." *Gulf C. & S. F. R. Co. v. Necco*, (Tex., Feb. 5, 1892,) 18 S. W. Rep. 564.

**Measure of Damages of a Tenant for Term of Years.**—Where tenants for a term of years of land, contested the right of a railroad company to appropriate a strip of such land for a right of way, it was error to admit testimony, in the proceedings, as to the value of the land taken, and of the buildings and fruit trees thereon, since the measure of the tenants' damage was the amount of diminution in value of their lease because of the appropriation. The court said: "The respondents were permitted to introduce testimony as to the value of the land taken, and of the buildings which were upon it when they took possession under their lease, and of the value of fruit trees growing thereon. So far as the respondents were concerned, the question was not one of the value of the premises, for that would not necessarily determine the value of the lease, but of the value of the use of the land for their unexpired term. They had only a limited interest in the land, and were entitled to compensation only for damages to that interest. If they had been the owners, the measure of their damages would have been the difference between the market value of the land before the taking of the right of way and immediately afterwards, irrespective of any benefits accruing from the building of the railroad, and the same principle should be applied, so far as possible, in determining the compensation to which they were entitled as tenants. In this case the respondents are entitled to be fully paid the difference in the market value of the use of the premises for the remainder of the term of their lease before the building of the railroad and the value after its construction, or, in other words, the amount of diminution in value of their lease because of the appropriation; and that may be shown by the opinion of witnesses having knowledge of such value or of the rental value of such premises in the neighborhood, and who are acquainted with the character and situation of the premises. In case no market value for such leasehold interests can be shown, it may be necessary to receive the opinion of witnesses as to the value of this particular lease before and after the condemnation. In addition to the damage to their leasehold estate, the respondents are entitled to recover the value of growing crops destroyed by the building of the railroad, and also the value of any buildings erected by them for their own use and benefit, and which they would be entitled to remove at the expiration of their term, or the cost of removing them to another part of the premises, if so removed. Respondents will have a right to show the condition of the premises at the time they took possession under the lease, and the condition in which they had been put by them at the time of the taking by appellant, as such testimony would have some bearing upon the question of the value of their interest in the land, and if it shall be shown to be necessary to remove the dwelling-house back from the right of way the cost of such removal should be paid by appellant. But it would not be competent to show the value of the work done on the premises by respondents, excepting the clearing of the land, which was stipulated for in the lease as a part of the rent reserved, in addition to the yearly payment of money, and which goes to make up the amount of the rent paid by respondents. It may be well to remark, in this connection, that in this class of cases it is difficult, if not impossible, to lay down a rule of universal application as to what may be considered as elements of damage, as the equities of the parties must more or less depend upon the particular facts and circumstances of each case. Everything

caused by the appropriation which renders the balance of the estate less useful and convenient should be considered in estimating the compensation to be paid." *Seattle & M. R. Co. v. Scheike* (Wash. Jan. 26, 1892) 29 Pac. Rep. 217.

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PRATT

v.

ROSELAND R. CO. *et al.*

(*New Jersey Court of Chancery, Aug. 19, 1892.*)

**Eminent Domain—Construction of Railroad—Compensation—Successive Estates.**—A railroad corporation, organized under the general railroad law, cannot lawfully enter upon any land in which there are successive estates, for the purpose of constructing its road thereon, without the consent of the owners, until it has first made compensation to the owners of both the present and future estates therein.

**Taking Land Without Compensation—Injunction.**—In case a railroad corporation attempts to take lands for the purpose of constructing its road thereon, against the will of the owner, and without first making compensation therefor, an injunction will be granted, though such taking results in no irreparable damage to the owner.

**BILL** to enjoin the construction of a railroad on certain land until compensation is made. Injunction granted.

*John W. Taylor*, for the motion.

*Cortlandt Parker*, opposed.

**VAN FLEET, V. C.**—The complainant is the owner of a small tract of land, containing less than an acre, situate in the township of Caldwell, in the county of Essex.

**Statement of case.** The land was sold for taxes in 1884, under the statute of 1879, and purchased by the defendant Van Order, for a term of 30 years. His term will not expire until 1914. The statute of 1879 makes taxes the first and paramount lien on the land against which they are assessed, (Supp. Revision, p. 990, § 50,) and also declares that a purchaser under a sale and conveyance made in enforcing such lien shall hold the land so acquired for his own use, benefit, and advantage against the owner and all persons claiming under him, and against all other estates therein, and against all other liens thereon, as fully and completely as though there were no other estates therein or liens thereon, until the term for which he purchased is fully completed and ended, (Supp. Revision, p. 992, § 58.) The corporate defendant was organized under the general railroad law for the purpose of constructing and operating a railroad from a point in the village of Caldwell,

in the county of Essex, to a point in the neighborhood of Roseland, in the same county. It has located its road across the front of the complainant's lot, and in grading its roadbed it has made an excavation on the complainant's lot, varying in depth from two to three feet. Van Order gave it authority to use the land for the purposes of its road. Its acts, therefore, so far as he is concerned, are perfectly lawful. But it has acquired no right to the land as against the complainant. It appears, on the contrary, that it took possession of it against his remonstrance. The complainant charges, and the charge is not denied, that Van Order intends to use the rear of the lot in question for a coal yard, and, in order to make such use more profitable and convenient than it would otherwise be, he proposes to lay tracks connecting his yard with the defendant's railroad. On these facts the complainant insists that he is entitled to two measures of relief: *First*, that the corporate defendant be restrained from further constructing its railroad on the land in question until it has made compensation to him for his estate therein; and, *second*, that Van Order be enjoined from laying tracks thereon for the purpose of connecting his coal yard with the defendant's railroad.

It is clear that the relief sought against Van Order cannot be granted. He has a right, as against the complainant, to the exclusive possession and enjoyment of the land until 1914, and may in the mean time appropriate it to any lawful use. He may construct a railroad on it for his own use, or erect a building on it, or use it for any other purpose to which a private owner may lawfully appropriate his land. That his dominion over the land, under his deed, was intended to embrace such uses, is manifest, in my judgment, from that provision of the statute which confers upon the purchaser of land sold for taxes the right to remove, at or before the expiration of his term, any building or material which he may have erected or placed thereon. Supp. Revision, p. 992, § 58. The use which Van Order intends to make of this land is, in my opinion, perfectly lawful, and one which the complainant has no right to challenge. As against him the order to show cause must therefore be discharged, with costs.

But the case against the corporate defendant stands on an entirely different foundation. The corporate defendant possesses no powers and has no rights except such as are conferred upon it and granted to it by the statute under which it was organized. That statute gives it power to take land for the purposes of its road, either by grant or the exercise of the right

Right of purchaser of land sold for taxes.

Power of railroad to enter land.



of eminent domain, but the power so granted is subject to this important limitation that it shall not enter upon any land, for the purposes of building its road thereon, without the consent of the owner or owners, until it has first made compensation for the same. This limitation is found in the ninety-ninth section of the general railroad law, and the words in which it is expressed are: "Provided, always, that the payment or tender of the payment of all damages for the occupancy of all lands through, under, or upon which the said railroad and its conveniences, appurtenances, and appendages may be laid out or located, be made before the said company, or any person under their direction or employ, shall enter upon or break ground in the premises, except for the purpose of surveying and laying out said railroad and its conveniences, appurtenances, and appendages, and of locating the same, unless the consent of the owner or owners of such lands be first had and obtained." Revision, 927, 928. The meaning of this provision, when considered, as it must be, in connection with that limitation which the constitution puts upon the power of the legislature, when it declares that "individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners," is made, as I think, perfectly plain, and it is this: That no railroad corporation, organized under the general railroad law, shall have a right to enter upon any land in which there are successive estates, for the purpose of constructing its road thereon, without the consent of its owners, until it has first made just compensation to the owners of both the present estate and the estate in reversion or remainder. The sixth section of the charter of the Elizabethtown & Somerville Railroad Company contains a proviso identical in substance with that just quoted from the general railroad law, and Chancellor PENNINGTON, in *Ross v. Elizabethtown & S. R. Co.*, 2 N. J. Eq. 422, held, in construing this proviso, that a condemnation against the owner of the present estate in the land—and in that case the owner of the present estate was a tenant in dower—gave the corporation no right whatever against the remainder-men, and that until compensation was made to them the land could not lawfully be appropriated by the corporation; and he therefore refused to dissolve an injunction which had been granted on the application of the remainder-men, restraining the corporation from constructing its road on the land until compensation was made to the remainder-men. He said (page 433) that the design of the proviso was "nothing more nor less than that the land to be occupied by the line of the road shall be first paid for, and to those who have rights in the same."

Those in remainder have therefore as strong, and in many cases a much stronger, claim for damages than the present occupant. \* \* \* The claims of all persons <sup>Rights of re-</sup> having rights in the land are clearly to be satisfied <sup>mainder-</sup> as well those who have reversionary interests <sup>man.</sup> as those having the present estate." Adopting this as a correct exposition of the law, as I think we must, it is made manifest that the defendant's appropriation of the land in question to the purposes of its railroad is not only without authority of law, as against the complainant, but in direct violation of a right guaranteed to him by the constitution.

The case presents another question: Does such a wrong entitle the complainant to an injunction? It is certain that the defendant's occupation of the land does not at present do the complainant any irreparable damage, in the sense in which that phrase is ordinarily understood. He has no right to the present enjoyment of the land. The outstanding term which has been granted against him will not expire for more than 20 years to come, so that the defendant's occupation of the land cannot, during that period, take anything from him to which he will have the least right. When the outstanding term shall have expired, he will have a right to have the land surrendered to him in as good state and condition as it was in when the purchaser under the tax sale took possession of it, damage resulting from the ordinary use and the elements excepted. Supp. Revision, p. 992, § 58. But this is the whole extent of his right. So that I think it is obvious that if this were a suit between private persons, involving nothing but strictly private rights, no injunction could be granted, for the reason that no irreparable present damage is shown, nor is it at all certain that any will ever be done. But a widely different rule <sup>When injunc-</sup> prevails in cases where a corporation, having au- <sup>tion granted.</sup> thority to take land on condition that it shall pay for the land before appropriating it, attempts to appropriate the land to its own use against the will of its owner, and without paying for it. In that class of cases, no irreparable damage need be shown, but the court will exercise its prohibitory power as soon as it is made to appear that the corporation is attempting to appropriate the land against the will of its owner, and contrary to the terms of its charter. Mr. Kerr, in his treatise on the Law of Injunctions, states the rule on this subject in this wise: "A private person who applies for an injunction to restrain a public incorporated company \* \* \* from entering illegally on his land is not required to make out a case of destructive trespass or irreparable damage. The inability of private persons to contend with these powerful

bodies, which have often large sums of money at their disposal, and are often too prone to act in an arbitrary and oppressive manner, raises an equity for the prompt interference of the court, to keep them within the strict limits of their statutory powers, and prevent them from deviating in the smallest degree from the terms prescribed by the statute which gives them authority." Kerr. Inj. 295. Other authors state the rule in substantially the same way: 1 High, Inj. § 622; Lewis, Em. Dom. § 632. This rule has been repeatedly recognized in this state; notably so by Chancellor PENNINGTON in *Ross v. Elizabeth Town & S. R. Co.*, *supra*, and by Chancellor ZABRISKIE in *Stevens v. Paterson & N. R. Co.*, 20 N. J. Eq. 126, 129, and by Chancellor RUNYON in *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, 25 N. J. Eq. 384, 387. I think I am bound to regard it as the established law of this court.

An injunction must issue, restraining the corporate defendant from further constructing its railroad on the land in question until it shall have made just compensation to the complainant for his estate in the same.

**Eminent Domain—Railroad Enjoined Upon Failure to make Compensation**  
 —Notwithstanding the provision in Code Virginia 1887, § 1072, that a railroad company shall not invade any "dwelling house, or space within 60 feet of one, belonging to any person \* \* \* without his consent" is repealed of implication, by acts 1874-75, pp. 35-36 providing that "in case any lot or lots along the line of such streets or alleys, shall, by such occupation or crossings, be impaired in value, such company shall, before crossing or occupying such streets or alleys, make compensation therefor to the owner of the same," the occupation of a street by a railroad within 60 feet of a dwelling house, will be enjoined where compensation has not first been made to the owner. *Hodges v. Seaboard & R. R. Co.* (Va. Feby. 11, 1892) 14 S. E. Rep. 380. The court said: "There has been on the statute books of this commonwealth for more than 40 years the following provision, now made a part of section 1072 of our Code, the history of which provision it is of importance in this connection for us to trace. This provision first made its appearance in the Second Revised Code, (1819) p. 213, § 7, by which turnpike companies were authorized to enter upon all lands and tenements through which they might judge necessary to make their roads, to lay out the same according to their pleasure, so that neither the dwelling house, yard, garden, nor curtilage of any person be invaded without his consent. A like provision was made in the Act of March 16, 1832, incorporating the stockholders of the James River & Kanawha Company. Acts 1831-32, p. 79, § 29. In the first general railroad act of the state, March 11, 1887, (Acts 1836-37, p. 104, § 9), it was provided: 'Previously to this institution, and during the pendency of the proceeding for ascertaining the damages to the proprietor for the condemnation of his land for the use of the company, the president and directors, their officers, agents, and servants, shall have full power and authority to enter upon all lands and tenements through which they may desire to conduct their railroad, and to lay out the same according to their pleasure, so that no dwelling house, or space within sixty feet of one, belonging to any person, be invaded with-

out his consent, and if they think the interest of the company requires it, to take possession thereof for the purposes of the company.' In 1841 this provision came under review in *James River & Kanawha Co. v. Anderson*, 12 Leigh, (Va.) 278, where the court held that, upon the construction of its aforesaid charter, the company had the right to enter upon and occupy the public streets of a town, as well and in like manner as the lands of individuals, when it shall deem the same necessary for its canal or other works liable to make compensation in damages to any party injured; Judge TUCKER, on page 314, saying: 'For the purposes of its work, it is authorized to enter upon any lands and tenements through which it desires to conduct its canal, without any limitation or exemption except the dwelling house, yard, garden, or curtilage of any proprietor. The streets and highways, which must obviously be encroached on, are not excepted. The streets of Richmond, therefore, are as much subject to be entered upon for the use of the company as any other property.' In this case the court held that under the language of the doctrine of the *James River & Kanawha Company*, authorizing it to 'enter upon all lands and tenements,' etc., it could enter upon the streets of a city as upon any other land. To obviate this objection, which equally applied to the general railroad law, the legislature enacted the following provision, to be found in section 23 of chapter 56 of the Code of 1849: 'No company shall occupy with its works the streets of any town until the corporate authority of the town shall have assented to such occupation, unless such assent be dispensed with by the special provision of law. See Report of Revisors, pp. 328, 329. As the law then stood, the railroad company could only enter the streets of a city or town upon the consent of the corporate authority, but could not 'invade the dwelling house of any person, or any space within sixty feet thereof' that is, while such companies might, under certain circumstances, enter cities, they were prohibited from invading the dwelling house of the citizen, or any space within 60 feet thereof belonging to the citizen, without his consent. See *Railroad Co. v. Wicker*, 13 Grat. (Va.) 375, where the court uses the following language: 'In my opinion, the terms of the statute, standing alone, import that a dwelling house, and a space of sixty feet about it, are exempt from invasion by internal improvement companies, as being reserved to the owner thereof. Without such invasion, the owner enjoys his dwelling house and circumjacent land to the extent of his boundary, however large. If, however, public necessity requires that a portion of his property be taken from him, it may be done, but not so as to invade his dwelling house, or a space of sixty feet about it. The law merely reserves to the owner a limited extent of his own property, but does not confer on him any control whatever over the land of the coterminous owner.'

"In this state of the law the legislature enacted the following provision: 'Be it enacted by the general assembly of Virginia that section 24 of chapter 56 of the Code of 1873 be amended and re-enacted so as to read as follows: "Sec. 24. No company shall cross or occupy with its works the streets or alleys, public or private, of any city or town without the assent of the corporate authorities thereof, unless such assent be dispensed with by special provision of law; and, in case any lot or lots along the line of such streets or alleys shall, by such occupation or crossing, be impaired in value, such company shall, before crossing or occupying such streets or alleys, make compensation therefor to the owner of the same, said compensation to be ascertained in the manner provided by law for the assessment of land damages. This act shall be in force from its passage." Act approved January 15, 1875. (Acts 1874-75, pp. 35, 36.) And it is claimed that this provision, by implication, repeals so much of the act as prohibits these companies from constructing their works, etc., within 60 feet of the land of the citizen as may lie circumjacent to his dwelling house. And,

while the law does not favor repeals by implication, this seems to be so, else there could not have been any use for so much of the act as provides that, "in case any lot or lots along the line of such streets or alleys shall, by such occupation or crossing, be impaired in value, such company shall, before crossing or occupying such streets or alleys, make compensation therefor to the owner of the same." This, however, cannot advantage the defendant company in this case; for, as it has not chosen to pursue the only way pointed out by the statute for invading the street, the fee in which, as we have seen, was in the appellant, and is within 60 feet of his dwelling house, it has not acquired the right to use this street."

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STREYER

v.

GEORGIA S. & F. R. Co.

(*Georgia Supreme Court, Aug. 1, 1892.*)

**Eminent Domain—Burden of Proof to Show Damages—Right to Open and Close.**—Under a statute which authorizes a railroad company to construct its road in a public street, but not until the payment by it of all damages which will be occasioned thereby to the property of any person, and which allows either the company or the property owner to commence proceedings to have the damages assessed, the company, on a trial of an appeal entered by it from the assessment made in a proceeding commenced by it, is entitled to open and conclude, the burden of proof being upon it to show either that the property in question was not damaged, or, if it was, the amount which would compensate the owner, and which must be paid or tendered by the company before constructing its road in the street on the terms prescribed by the statute.

**Damage to Contiguous Property—Market Value.**—The damage to contiguous property resulting from the construction of the railroad in a public street, which the Act of December 17, 1888, (Acts 1888, p. 139.) contemplates, is such damage as must be compensated for by reason of that provision of the constitution which declares that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." The ultimate and only measure of such damage is the diminished market value of the property. Market value for this or that particular use, and change in the same by reason of locating the railroad in the street, are irrelevant, save as evidence tending to show general market value; that is, value in the open market without respect to any particular use. Diminished rental value for any purpose is no basis for compensation except as to its result, if any, on the general value.

**Physical Property and Easement Considered Together.**—In determining the question of damages and assessing the amount, the physical property (land and buildings) and the easement of access thereto from the street are not to be considered as having separate values, as if they were two different parcels of property, but are to be treated as parts of one and the same estate. Whether damage has been or will be done by the construction and use of the railroad depends upon whether the market value of the whole estate as one object of ownership has been or will be diminished by reason of devoting the street to this new use.

ERROR from Bibb County Superior Court. Proceedings to assess damages.

The following is the substance of the official report :

Streyer moved for a new trial on the ground that the verdict was contrary to law, evidence, etc. Also because the court permitted the witness Elkin to be asked the following question: "What was the condition of Fifth street before the railroad was put down?" Also because the court permitted Collins to answer the following question: "How much more would you give for the Streyer property now than you would before the railroad came there?" Answer. Twice as much." Also because the court erred in refusing to permit Freeman and another, witnesses for defendant, to answer the following question: "Tell the jury why you left there,"—referring to their leaving the dwelling houses on that street, owned by other parties than Streyer,—because the same was material to the issue, and was asked to show that the construction of the railroad along the street in question had actually driven tenants from houses occupied by them all along said streets. Also because the court erred in not permitting Gibson, a witness for defendant, and his agent to collect his rents and attend to said property, to testify to the declarations and complaints made to him at the time by the tenants in Streyer's houses, when they vacated the same; said declarations being material, as showing directly what damage the construction of this railroad in the street in front of Streyer's property had already inflicted upon it, and the cause of their leaving it. Also because the court erred in refusing to charge as follows: "I charge you that, under the wording of the constitution of the state and of this special act under which the railroad is proceeding, it must first pay Streyer the value of any property belonging to him, which it may appropriate to its use, and also the actual and direct damages which would be inflicted upon the property which would of necessity flow from this taking, or the construction of the road in the street and in front of his property. I charge you that there exists in the owners of abutting lots a private right to have free access to their lands and buildings as the same was and would have continued to be according to the mode of its original use and appropriation by the public, and there can be no change of such mode and adaptation of the street to new vehicles and methods of carriage and transportation, which will materially impair or destroy such right, unless by consent of the owners, upon payment of due compensation to them. I charge you that the owner of property abutting upon a street has certain rights in said street which attach to his property, and are

known in law as an 'easement.' This easement is property in constitutional intent, and is subject to taking just as the land itself; and that when this easement is interfered with, in whole or in part, the party interfering must pay for the damage done the same. I charge you that a regular steam railroad in the street, over which freight and passengers are hauled in trains, is an extra burden on the street, and is a taking in contemplation of law of the abutting property owner's easement in the same, the value of the same being proportional to the amount of the easement taken or destroyed. You will first find out from the evidence the value of the portion of the easement destroyed or taken in the construction of the road; then you will further inquire how much damage will be inflicted upon the abutting property by reason of taking of part of the easement, and the uses to which the part taken will be put. You cannot set off any benefits against the value of the property taken." Also because the court erred in refusing to charge, in the form submitted, the following written request by defendant: "I charge you that in considering the evidence submitted to you, if you cannot reconcile the same, you must believe that which is positive and direct in preference to that which is only conjectural, or based on a mere speculative opinion." Also because the court erred in refusing to charge as follows: "As you cannot find damages for speculative or possible injuries to this property, so you cannot set off, against the actual damage which will be inflicted on Streyer's property by reason of the construction of this railroad in the street, as shown by the evidence, benefits which might possibly accrue to his property from the said cause. Speculative inquiries as to what might possibly happen to his property are excluded, and the only benefits you can set off against the proven damage are such as appear from the evidence to be direct, positive, proximate, and certain to follow, not such as are only possible, contingent, speculative, or which depend entirely upon the will of outside parties." And in charging in lieu thereof the following: "Now, in considering that question, you are not to consider any speculative damages or benefits either way. You are to take the testimony as reasonable men, and not take into account any speculative or imaginary damage that might result to this property, and at the same time you are not to consider any possible, speculative, or imaginary increase in value. You are to take the reasonable, natural result that will flow from the railroad coming there, both as to increasing and diminishing the value of Streyer's property." Also because the court erred in charging "The measure of damages would be the depre-

ciation of its market value." Also because the court erred in charging: "If you find there was damage, in order for you to ascertain how much, you would first determine under the testimony what its original market value was before the railroad attempted to come there, and then ascertain whether or not that market value has been decreased by reason of the railroad coming there, and the amount of that decrease would be the proper amount of your verdict." Also because the court erred in charging: "If you believe from the evidence that it [referring to the running of trains on the street, with the noise, smoke, dust, etc.] amounts simply to an inconvenience to the occupants, for instance, if you or I were living there we would rather not have simply a disagreeable annoyance, that is not damage; that is not a thing that you could treat as damage for which a money value could be given." Also because the court erred in charging: "Now, it may be true you may find from the evidence that, in point of fact, the coming of the railroad will decrease the value of this property for rental purposes, but upon that alone you could not base a verdict for Streyer, unless you were satisfied from the testimony that the effect at the same time would be to decrease its market value." Also because the court erred in the charge, as a whole, in that it nowhere submitted defendant's theory, as brought out by testimony and urged in argument, that Streyer was entitled to all enhancement in the value of his property, arising from natural growth of the city or causes other than the railroad in the street, and because the court erred in failing to warn the jury that enhancements in value arising from such causes could not be set off against actual proven damage. And that the court erred in its charge as a whole, in that it did not charge that the benefits which could be set off against the actual proven damages could only be such benefits as the evidence showed would spring alone from improvements placed upon the street in front of or in the vicinity of Streyer's property, the same having been urged by defendant's counsel in argument. And because the court erred in its charge as a whole, in that it continually referred to benefits which the jury, from the evidence, might set off against the proven damage, no benefits being mentioned in the special act of December 17, 1888, not authorized by the evidence, such position being urged by defendant's counsel during the trial and the argument. And because the court erred in its charge as a whole, in that the charge continually referred to the market value of the property, without defining what market value was meant, whether of the land itself or of the property considered as a whole, houses and land



together, and for the purposes for which it was then used, the same being urged by defendant's counsel. And that the court erred in its charge as a whole, in that it repeatedly assumed that any benefits arising from the construction of the railroad in the street could be set off against the proven damages, when, in truth and in law, no benefits could be set off against such damages, except such as would flow directly from improvements placed upon the street itself, the mere construction of the railroad itself being no improvement put on the street; the last-mentioned view being urged by defendant's counsel in argument, even supposing the special act authorized the setting off of any benefits at all. And because the court erred in its charge as a whole, in continually referring to the market value of the property, and distinctly telling the jury that by market value it did not mean rental value or the value of the property for rental purposes; defendant contending that if market value were to be considered it should be market value for the purposes for which the property had been dedicated and improved, and it would be especially lessened by a railroad in the street; and contending, further, that the measure of damages for a railroad in the streets of a city in front of residence property was a distinct legal principle, *sui generis*, and confined to the actual damage done the property as it then stood, and for the purposes the property was used; and, if market value were considered, it should be the market value for the purposes the property had been improved and was used,—the market value for residence purposes.

*F. J. M. Daly and Hardeman & Nottingham*, for plaintiff in error.

*Gustin, Guerry & Hall*, for defendant in error.

PER CURIAM.—Judgment affirmed.

**Eminent Domain—Right to Open and Close.**—See *Bellingham Bay & B. C. R. Co. v. Strand* and note, *ante*, pp. 608, 614.

**Same—Market Value of Property Taken as Measure of Damages.**—See *Colorado Cent. R. Co. v. Allen* (Colo.) and cases cited in note, 70 Am. & Eng. R. Cas. 193, 205.

## PARKER

v.

FT. WORTH &amp; DENVER CITY R. CO.

*(Texas Supreme Court, April 15, 1892.)*

**Eminent Domain—Admission of Judgment in Evidence in an Action to try Title.**—In an action of trespass against a railroad company to try title to land condemned for railroad purposes, it was error for the court to admit in evidence a judgment in such proceedings, which recited that notice was given, founded on the report of the commissioners stating that they had given such notice to the owners of the land, in the absence of evidence that such notice as the law prescribes had been given to the owners.

**Sufficiency of Description of Land Sought to be Condemned—Parol Evidence.**—Where a statute requires the application for proceedings to condemn land "to state, in writing, the real estate and property sought to be condemned," the application must contain a description of the land by which it may be identified with certainty. A petition of a railroad company to condemn land for right of way simply which states that the line entered the land on the eastern boundary and passed out on the western boundary embracing a width of 50 feet on each side of the centre line without designating the points of entry and departure, is not sufficient to support a judgment condemning the right of way, and it is improper to receive parol testimony to supply the defect of the petition.

**Recording Judgment in Condemnation Proceedings.**—Under Revised Statute Texas, Article 4332, a judgment in proceedings to condemn land must be recorded in order to protect the railroad company from the claims of a subsequent purchaser.

APPEAL from Wichita County District Court.

*W. W. Flood*, for appellant.

STAYTON, C. J.—This is an action of trespass to try title, instituted by appellant to recover a section of land patented to Simeon Stark, from whom he deraigned title by regular chain of transfer. Appellee, after having first made defense to the entire action, disclaimed as to all the land sued for, except a strip of land 100 feet wide, extending through the grant, over which it claimed to have acquired right of way through proceedings in condemnation instituted on May 15, 1882, which was prior to the purchase of the land by appellant. Judgment was rendered in favor of the plaintiff for the land, subject to the defendant's right of way, which it was held had vested in defendant. The petition seeking condemnation alleged that the owners of the land were unknown; that the company had laid out its line through Wichita county, and was then engaged in constructing its road; and that "it is necessary that the line thereof should run and the same has been laid out over and through

a parcel of land in said county described as follows, to wit: Being a survey or head right in the name of S. A. & M. G. R. R. Co., and situated about fifteen miles from the town of Wichita Falls, located by virtue of said company scrip No. 21-210, abstract No. 274, patented to Simeon Stark, Dec. 12, 1874, patent No. 330, vol. 7, containing 640 acres of land,—and said line, as located and to be constructed, enters said tract of land on its eastern boundary, and, running in N. W. direction, passes out of said tract of land, on the western boundary line of the same, and embraces a width of 50 feet on each side of the center line of said railway as located.”

On the same day the county judge appointed commissioners to assess the damages “on the land described in said petition by reason of the construction of said railroad thereon.” On June 26, 1882, the commissioners made a report, in which they stated that after giving notice to parties as required by law they heard evidence, in the absence of the owner, “as to the land described in the petition, and the damages thereto by reason of the construction of the railway thereon and assess the damages thereto at eighteen 75-100 dollars.”

On this report, on July 13th following, the county judge entered a decree, which recited an inspection of the petition, notices, report of the commissioners, and declared that the petition was duly filed, the commissioners regularly appointed, and that the owners of the land sought to be condemned had been served with notice. The decree then declares that the damages had been deposited in court subject to the order of the owners of the land, and decreed “that the right of way in, to, and through the following described tract or parcel of land, situated in the county of Wichita and state of Texas, to wit, being a survey in the name of the San Antonio & Mexican Gulf Railroad, situated about 15 miles west from the town of Wichita Falls, located by said company scrip No. 21-210, and patented to Simeon Stark, December 12, 1874, pat. No. 330, vol. 7, and known by ‘Abstract No. 274,’ containing 640 acres of land, be granted to and vested in the Fort Worth & Denver City Railway Company, its successors and assigns, forever.”

Many objections were urged to the admission in evidence of the petition seeking condemnation of right of way, to the report of the commissioners, and to the decree of condemnation, but it is not necessary to notice more than two of them. It was urged that the decree was inadmissible, in the absence of evidence that such notice had been given to owners as the law prescribes, and we are of opinion that this objection should have been sustained. The proceeding to condemn land for public use is special in its character, and its

validity must depend upon a compliance with the law authorizing it. Nothing is to be presumed in favor of the power of such a special tribunal, and it is incumbent on one seeking to show right under its decree to show that the court had acquired jurisdiction to render it.

Notice to the owner of the land sought to be condemned is necessary to jurisdiction, and this cannot be presumed from declarations contained in the report of the commissioners, nor from recitals in the decree of condemnation, but must be proved. Commissioners <sup>Notice to land owner.</sup>  
*v. Thompson*, 15 Ala. 139; *Barnett v. State*, *Id.* 829; *Molett v. Keenan*, 22 Ala. 484; *Inhabitants of Lancaster v. Pope*, 1 Mass. 87; *Southard v. Ricker*, 43 Me. 576; *Prentiss v. Parks*, 65 Me. 559; *Leavitt v. Eastman*, 77 Me. 119; *Dupont v. Highway Comrs.*, 28 Mich. 362; *Daniels v. Smith*, 38 Mich. 660; *Lane v. Burnap*, 39 Mich. 736; *Nielsen v. Wakefield*, 43 Mich. 434; *Whiteley v. Platte Co.*, 73 Mo., 30; *State v. Otoe Co.*, 6 Neb. 130; *Semon v. City of Trenton*, 47 N. J. Law, 490; *Thompson v. Multnomah Co.*, 2 Or. 41; *State v. Officer*, 4 Or. 182; *Appeal of Central R. Co.*, 102 Pa. St. 38; *Columbus, C. & I. C. R. Co. v. Troesch*, 57 Ill. 155. This is the general rule as to proceedings of special tribunals. *Mitchell v. Runkle*, 25 Tex. Supp. 137; *Freem. Judgm.* 123. The statute requires that the commissioners shall issue "notices in writing to each of the parties, notifying them of the time and place selected for the hearing." Rev. St. art. 4186. The manner and time of service is also prescribed, and, when the owner is unknown, this service may be made by publication. *Id.* arts. 4187, 4189, 4190. "The person making such service shall return the original notice to said commissioners, or any one of them, on or before the day set for the hearing, with his return in writing thereon, stating how and when the same was served." *Id.* art. 4188. Until these provisions of the statute are complied with, the commissioners have no authority to assess damages or to make a report, and the court has no jurisdiction to declare the condemnation. The commissioners are required to make a report wherein must be stated the amount of damages due to the land owner, and they are required to return with this "all other papers connected with the case," (Rev. St. art. 4197;) but the statute does not authorize them to state their conclusions as to the sufficiency of notice given by them to the land owner.

It was further urged that there was not such description of the land sought to have condemned as was necessary, and that for this reason the petition, report, and decree were invalid. It is certainly necessary that the petition should so describe the land to be taken <sup>Sufficiency of description.</sup> that the commissioners may know upon what to base their

estimate of damages, and that the interested parties may come prepared with evidence to show what will be just compensation for the land to be condemned. It is important that the report of the commissioners should show that their estimate of the damage is based on the taking of the land applied for, and it is equally important that the decree of condemnation should show with reasonable certainty what is condemned to public use.

This should appear upon the face of the proceedings, and not be left to ascertainment by parol evidence, except as this may be used to identify objects called for in the application and decree, for the purpose of applying them as in other cases. The statute requires the applicant for condemnation of land "to state in writing the real estate and property sought to be condemned," and, if this be not so done as to identify the land to be taken, the jurisdiction of the tribunal having power to condemn never attaches, it matters not what notices of the proceeding may be given. 'In the case of *Railway Co. v. Manufacturing Co.*, Civil Cas. Ct. App. § 396, the court of appeals of this state properly held that in such cases the "designation must be sufficiently certain to identify the particular portion of the land over which the right of way is sought.

Without this, the owner of the land cannot know what portion of his land is required, nor the commissioners what damage to appraise, nor the petitioner the precise land acquired; nor can the decree of the court vest the easement in any particular land. It is the right of the owner of the land to know exactly the precise land taken, and it is the right of the party acquiring to know that which he has acquired. *In re New York Cent. & H. R. R. Co. v. Rau*, 70 N. Y. 191; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 418. It is said the certainty required in such description is of the same nature as that required in conveyances of land, so that a surveyor could go upon the land and mark out the land designated. The taking of the land is in the nature of a conveyance from the owner, and he is entitled to know how much land is taken from him, and the exact boundaries of what remains. *Mills*, Em. Dom. § 115; *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391. This we understand to be the true rule. *Toledo, A. A. & N. M. R. Co. v. Munson*, 57 Mich. 42, 20 Am. & Eng. R. Cas. 410; *Indianapolis & V. R. Co. v. Newsom*, 54 Ind. 121; *Pennsylvania R. Co. v. Porter*, 29 Pa. St. 165; *In re New York Cent. & H. R. R. Co.*, 90 N. Y. 342, 10 Am. & Eng. R. Cas. 542; *Lewiston v. County Commissioners of Lincoln*, 30 Me. 24; *Mills*, Em. Dom. § 115; *Lewis*, Em. Dom. 350-352. The grant from which the land to be

condemned was to be taken was identified by the petition and by the decree, but the latter only described the land condemned as a right of way through the grant thus generally described.

The petition alleged that a line had been located, but referred to no object and gave no description whereby that line might be ascertained by any person, however familiar with the land. It simply stated that the line "enters said tract of land on its eastern boundary, and, running in north-west direction, passes out of said tract of land on the western boundary line of the same, and embraces a width of 50 feet on each side of the center line of said railway as located." At what point on the eastern boundary of the land the line entered, and at what point on the western boundary it left, the tract of land, the petition gave no information whatever.

The railway was not constructed, nor does it appear from any part of the record introduced in evidence that the line of the road, if located, was in any manner described or identified; and holding, as we do, that this must appear on the face of the record of proceedings to condemn land to public use, the decree must be held to be inoperative.

The parol testimony introduced ought not to have been received, for the defective proceedings could not be cured by such evidence. If the condemnation proceedings had been regular, and the decree sufficient to vest in the railway company the right of way, still under the evidence, plaintiff was entitled to have the question of innocent purchaser considered by the jury. The decree of condemnation was not recorded in the county in which the land was situated, and before the railway was constructed or notice of the condemnation proceedings given to plaintiff he bought and paid valuable consideration for the land, or, at least, the evidence tends to show that this was true. We see no reason why the registration laws should not apply to such an estate as the railway company would have acquired had the proceedings to condemn the property been regular. Rev. St. arts. 4332-4339; *Bush v. Golden*, 17 Conn. 594; *Prescott v. Beyer*, 34 Minn. 493; *Worley v. State*, 7 Lea (Tenn.) 382; *Masterson v. West End N. G. R. Co.*, 5 Mo. App. 64.

The court should have excluded the petition, report, and decree in the condemnation proceedings, as well as the parol evidence offered and objected to, and should have given a charge on the question of *bona fide* purchaser; and for its rulings in these respects, as well as the ruling in the general charge, its judgment will be reversed, and the cause remanded. It is so ordered.

**Eminent Domain—Recovery of Damages to Land not Included in Petition or Answer.**—Where, in a proceeding instituted by a railroad for the appropriation of certain lands for a right of way, the land supposed to be taken was a strip 100 feet wide through a larger tract described in their petition, and therein alleged to belong to defendants, the defendants in their answer, set up title and asked for damages to the identical parcels of land described in the railroad company's petition and for none other; but upon the trial sought to recover damages to another tract also owned by them, but which was not described in the pleadings in any way, and which the right of way in question did not touch; the claim for damages being based upon the fact that it adjoined the land described through which the right of way sought to be taken did run, and that it all constituted one farm. *Held*, the defendants cannot recover damages for the tract of land not described in their pleadings. The court said: "The land proposed to be taken was a strip 100 feet wide through a larger tract described in appellant's petition, and therein alleged to belong to the respondents. The respondents, in their amended answer, set up title, and asked for damages to the identical parcels of land as described in the appellant's petition and for none other. Upon the trial respondents sought to recover damages to an 80-acre tract, also owned by them, but which was not described in the pleadings in any way, and which the right of way in question did not touch; the claim for damages being based upon the fact that it adjoined the land described through which the right of way proposed to be taken did run, and that it all constituted one farm tract. Upon the offering of testimony by respondents, relating to such damages, the appellant objected to its introduction on the ground that the respondents, by only alleging in their answer that they were damaged in the lands there described, had waived any right they might have had to recover whatever damages they may have suffered in the balance of the tract, and that as no mention had been made, or question raised, as to any such damage in any of the pleadings, such proof was inadmissible thereunder. The court overruled the objection, and admitted the proof, and this is assigned as error.

"The respondents contend that the law does not require the petitioner to describe any land except that proposed to be taken for the right of way itself, and that they were not required to answer at all, and that consequently they were entitled to offer proof of the damage to the whole tract; but we think this claim is untenable, under the circumstances of this case, however the law may be as to the description required to be set forth or as to the pleadings required. Here the respondents did answer and raise an issue as to the amount in which they would be injured, resulting from the damage to the particular tracts described in the petition, and which they described in their answer, and made no claim of damages to any other tract. Under such circumstances, they should not have been allowed to prove that they were damaged to a further extent by reason of damages resulting to this other undescribed tract of which the appellant had no notice, so that they might be prepared to show the character and value of such other land, and such other matters as would form a basis for the estimation of the amount of the damages resulting to it, if any." *Northern Pac. & P. S. S.R. Co. v. Coleman*, (Wash. Dec. 1, 1891) 28 Pac. Rep. 514.

**Omission of Description of Land from Commissioners' Report.**—In *Hanes v. North Carolina R. Co.*, 109 No. Car. 490, the court held that a commissioners' report which does not contain a description of the land taken for a railroad right of way by defendant, is not fatally defective, since the location of the right of way could be made certain.

**Company must Describe Portion They Wish to Acquire.**—When a company seeks to obtain power to acquire a limited portion only of a piece of land of

great extent which is not broken up into closes, they must frame their deposited plans in such a way as to show how much of it they mean to acquire power to take. *Protheroe v. Tottenham & Forrest Gate R. Co.*, (1891) 3 Ch. 278.

**Deviation from Original Plan—Necessity for Plan of Deviation.**—Under “The Railway Act of Ontario,” R. S. O. chap. 170, a railway company having filed an original plan showing the location of its line and desiring to acquire other land compulsorily for the purpose of an alteration from the original location, however small the deviation may be, must file, under sub-section 7 of section 10, a plan of the proposed deviation. And where a railway company without having filed such plan applied for and obtained from a County Court Judge a warrant for possession on a notice in which in addition to a sum in cash certain crossings and station privileges were offered as compensation for the land and the damages, and which was accompanied by a surveyor's certificate that the sum offered was a fair compensation therefor: *Held*, that the foundation of the Judge's authority to issue a warrant rested on a proper compliance by the railway company with the above sub-sections, and that he had acted herein without jurisdiction. *Brooke v. Toronto Belt Line R. Co.*, 21 Ont. 401.

**Petition Need Not Show Performance of Conditions Precedent.**—In proceedings to condemn land for railway purposes under New York Code Civil Procedure, § 3360 subd. 7 which provides, that the petition shall contain “a statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement for which the property is to be condemned, and that all the preliminary steps required by law have been taken to entitle him to institute the proceeding,” it is not necessary that such petition should set forth the facts in detail showing performance of all the conditions precedent to be observed by plaintiff before it can condemn the lands. *Rochester R. Co. v. Robinson*, 133 N. Y. 242. The court said: “The proceeding was dismissed, and the application for the appointment of commissioners of appraisal denied, upon the sole ground that the petition was fatally defective in not setting forth the facts showing that all the conditions precedent to be observed by the plaintiff before it can take property for a public use against the will of the owner had been performed. In this respect the averment in the petition is a literal compliance with the provisions of subdivision 7 of section 3360 of the Code. It is objected to this form of pleading that it does not state facts, but only the legal conclusions of the pleader; and that it is therefore insufficient to confer jurisdiction upon the court to proceed with the matter and enter final judgment of condemnation. We do not think the objection is tenable. It is a sufficient answer to such a criticism that the whole proceeding is regulated by statute, and that upon this point the law has defined with precision and exactness the form and substance of the allegation required. The legislature does not seem to have left any room for doubt or construction upon the subject. The section begins with a declaration that the proceeding shall be initiated by the presentation of a petition, which shall set forth certain specified facts enumerated in subdivisions 1 to 6, inclusive; and, wherever a general statement is regarded as insufficient, care has been taken to provide that facts shall be stated in detail,—as, where the name or place of residence of an owner cannot, after diligent inquiry, be ascertained, it may be so averred ‘with a specific statement of the extent of the inquiry which has been made.’ But when subdivision 7 is reached, a marked change in the phraseology and grammatical construction of the section occurs. Instead of requiring specific facts to be stated, it is provided that the petition shall contain ‘a statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement for which the property is to be condemned; and that all the preliminary steps required by law have been



taken to entitle him to institute the proceeding.' This change is significant, and was evidently intentional; and we are not at liberty to import into the paragraph provisions and requirements which the framers of the law have purposely omitted from it. While the plaintiff might, if he should so elect, set forth the several acts done by him, which constitute the preliminary steps referred to, yet he may adopt the language of the statute, and in the concise form there prescribed tender an issue to the defendant upon this branch of his case. The latter cannot be prejudiced by such a practice. What the law requires the plaintiff to do before the commencement of the proceeding is as well known to the one party as the other. If the defendant has knowledge that any preliminary step required has not been taken, he can, under section 3365, put the allegation in issue by a specific denial, or by including it in a general denial of all the averments of the petition, or, if he has no knowledge or information sufficient to form a belief upon the subject, by a denial in that form, and thus compel the plaintiff to make proof of compliance with all the statutory requirements, or fail in the proceeding. An allegation of this kind is not correctly described as a conclusion of law. It is the averment of a fact,—one, it is true, which is a deduction from other facts known to the pleader to have an existence. It is what is aptly described as a resultant fact or a conclusion of fact, and it is such facts, and not evidentiary facts, which should be alleged in a pleading. *Badeau v. Niles*, 9 Abb. N. Cas. (N. Y.) 48. A statement is not to be deemed any the less a statement of fact because its ascertainment may depend upon some principles of law applicable to various other facts and circumstances, (*Prickhardt v. Robertson*, 17 Fed. Rep. 500;) and it has always been held to be good pleading under the Code to state facts according to their legal effect. *Brown v. Champlin*, 66 N. Y. 214; *Thayer v. Gile*, 42 Hun. (N. Y.) 268. 'Pleadings are not now to be strictly construed against the pleader, and averments which sufficiently point out the nature of the pleader's claims are sufficient, if under them, upon a trial of the issue, he would be entitled to give all the necessary evidence to establish his claim.' *Berney v. Drexel*, 33 Hun. (N. Y.) 34-37. An allegation that due proceedings had been taken to establish a mechanic's lien was held, on demurrer, to be good. *McCorkle v. Herrmann*, (Sup.) 5 N. Y. Supp. 881. In providing that the plaintiff may allege in this general way the performance of the necessary statutory conditions precedent, the legislature has not introduced a novel rule of pleading. They have simply followed a declared policy upon this general subject, which first appeared in section 139 of the Code of 1848, and was re-enacted as section 533 of the present Code. It is there provided that in pleading the performance of a condition precedent in a contract it is not necessary to state the facts constituting performance; but the party may state, generally, that he duly performed all the conditions on his part, and, if the allegation is controverted, he must, on the trial, establish performance. The legislature evidently failed to discover any good reason why it would not be equally safe and proper to permit the performance of statutory conditions precedent to be pleaded in the same way. A like rule has been adopted with reference to pleading a judgment or other determination of a court or officer of special jurisdiction. Code, § 532. It works no hardship to the defendant, but really affords him greater latitude of pleading, for, if but a single step has been omitted, he can safely deny the general allegation, and thus compel the plaintiff to make proof of performance of every essential condition. These conclusions do not involve any relaxation of the rule of construction which requires that statutes which seek to deprive the citizen of his property against his will shall be strictly construed. The law under consideration does not authorize the taking of the property of any one. It merely prescribes the method of judicial procedure in those cases where, by

virtue of the provisions of some other law, the exercise of the right of eminent domain has been conferred for public purposes. It is to receive the same liberal construction as the other provisions of the Code, which regulate the practice in actions and proceedings in courts of justice, without regard to the magnitude or value of the property rights which may be involved. The plaintiff is not relieved of the necessity of making strict proof of its right to take the defendant's property, provided the allegations of the petition are controverted. If, upon the trial, it is unable to show that every preliminary step which is of the substance of the proceedings has not been taken, its effort to impose an additional burden upon the premises of the defendant will be defeated; but the question here is one of pleading, and not of proofs."

**Allegation of Ownership Necessary in Action for Damages.**—To recover damages caused to a city lot by the construction of a railway it is essential that the plaintiff, in the action to recover, allege that he was the owner of the lot at the time of the injury to the property. The court said: "It is the law of this state that a lot owner can only recover for those damages which he has sustained from the construction or operation of a road subsequent to the time when he acquired his title to the property. If the road has been constructed and is in operation at the time he gets title, he is supposed to have taken it *cum onere*, and to have paid the lesser price because of the disadvantages. The damages arising from the construction inure to the holder of the fee, and do not pass by the deed which transfers the title. This principle, which has been recognized in the previous adjudications of the state, in no manner affects the right to recover any damages which may be sustained from those acts of the company which may further diminish the value of the property. The allegation of ownership with reference to the time of construction, is essential, because it bears largely on the measure of recovery. It is a traversable fact on which the company has the right to take issue and be heard. It is equally true that for the construction of a road along the streets of a city, when it is built under statutes which authorize its construction, and under ordinances which permit the use and occupation of the streets of the city, the abutting lot owner can only recover for the special damages which he sustains beyond what he suffers in common with the other denizens of the city. It is a necessary corollary that, if these special damages only are recoverable in this sort of an action, they must be averred, and averred in a traversable fashion, so that evidence may be taken upon the issue, and it submitted to the jury. The complaint was defective in these particulars, and, since they are of the substance, the ruling of the court may be complained of on this appeal. *City of Denver v. Bayer*, 7 Colo. 113, 2 Am. & Eng. Corp. Cas. 465; *Denver & S. F. R. Co. v. Domke*, 11 Colo. 247; *Jackson v. Ackroyd*, 15 Colo. 583; *Town of Longmont v. Parker*, 14 Colo. 387; *Walley v. Platte & D. Ditch Co.*, 15 Colo. 579; *Indianapolis, B. & W. R. Co. v. McLaughlin*, 77 Ill. 275." *Colorado Midland R. Co. v. Trevarthen* (Colo. Oct. 26, 1891) 27 Pac. Rep. 1012.

**Judgment for Damages Should be to Land Owner Personally.**—Under the constitution and statutes of Illinois when the only question in condemnation proceedings is simply as to the damages resulting to a particular tract of land claimed by one whose ownership is not disputed and who has offered no evidence as to the nature or extent of his interest, the judgment upon the report or verdict should either direct payment to the plaintiff or a deposit with the county treasurer for his benefit, so as to secure to him personally, the entire damages awarded, and an order directing the same to be paid to the county treasurer "for the benefit of the owners and parties interested" in the lands is erroneous. The court said: "The bill of rights of the constitution of Illinois (Const. 1870, art. 2, § 13) declares:

' Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law.'

"The eminent domain act, passed under this constitutional provision, (Rev. St. Ill. 1874, chap. 47, p. 475,) directs in terms that just compensation for private property taken 'shall be ascertained by a jury as hereinafter prescribed.' Section 1. The procedure thereafter provided was a petition by the party authorized to take the property to a judge of the circuit or county court, describing the property and naming the owners appearing of record, if known, or, if not known, stating that fact, and praying that the compensation be assessed. Section 2. In the one petition any number of parcels of property might be included, and the compensation for each assessed separately by the same or different juries. Section 5. Process was to be served, as in cases in chancery, (section 4,) a trial had, and the verdict, or 'report of the jury,' as it is called, was 'to clearly set forth and show the compensation ascertained to each person thereto entitled.' Section 9. The oath to be taken by the jury contemplated also the same separate ascertainment. Section 8. Section 10. The judge or court shall, upon such a report, proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property, and the use of the same, upon payment of full compensation, as ascertained as aforesaid.' Section 11 adds that 'any person not made a party may become such by filing his cross-petition,' and that his rights 'shall thereupon be fully considered and determined.' Section 14 is as follows: 'Payment of compensation adjudged may, in all cases, be made to the county treasurer, who shall, on demand, pay the same to the party thereto entitled, taking receipt therefor, or payment may be made to the party entitled, his, her, or their conservator or guardian.'

"These sections make it clear that under the pleadings the judgment entered upon this report or verdict should either have directed payment to the plaintiff, or that the deposit with the county treasurer was for his benefit. In other words, *Convers*' right to this money should have been settled by the judgment, and not left open to further inquiry." *Convers v. Atchison, T. & S. F. R. Co.*, 142 U. S. 671.

**Collateral Attack on Condemnation Proceedings—Misjoinder of Parties.**—The misjoinder of parties defendant, or the omission to recite, in the order appointing commissioners, that they are disinterested, are not subjects for collateral attack upon condemnation proceedings. The court said: "The objections made by plaintiff to the condemnation proceedings, that the owners of other property were joined with plaintiff when all parties thus joined did not reside in the same circuit, and that the orders of the judge made in chambers did not recite that the commissioners were disinterested, cannot be heard in this collateral proceeding, having determined, as we have, that the court had jurisdiction of the subject matter and the persons of the land owners. These are all matters of exception, and come too late now. *Quincy, M. & P. R. Co. v. Kellogg*, 54 Mo. 334; *Missouri Pac. R. Co. v. Carter*, 85 Mo. 448, 28 Am. & Eng. R. Cas. 249; *Evans v. Haefner*, 29 Mo. 141; *Quayle v. Missouri, K. & T. R. Co.*, 63 Mo. 465; *Kellogg v. Price*, 42 Ind. 366; *Huling v. Kaw Valley R. & Improvement Co.*, 130 U. S. 559, 39 Am. & Eng. R. Cas. 52; *Lewis, Em. Dom.* 601." *Thompson v. Chicago, S. F. & C. R. Co.* (Mo. March 2, 1892) 19 S. W. Rep. 77.

## AMERICAN CANNEL COAL CO.

v.

HUNTINGBURG, TELL CITY &amp; CANNELTON R. CO.

*(Indiana Supreme Court, Jan. 5, 1892.)*

**Eminent Domain—Award of Appraisers.**—The award agreed upon by two of three appraisers, in the appropriation of land by a railroad company, is valid.

**Appraisal of Several Tracts of Same Owner—Award in Gross.**—In appraising damages to several tracts of land belonging to the same owner, an award of a sum in gross covering damages to all the tracts is sufficient, without stating separately the damage to each.

**Presumption of Qualification of Appraisers.**—On appeal, it will be presumed, in the absence of a specific averment to the contrary, that the appraisers, in proceedings to appropriate lands for railroad purposes, were duly qualified.

APPEAL from Spencer County Circuit Court.

Proceedings for the appropriation of lands.

*A. H. Garland and Heber F. May*, for appellant.

*Iglehart & Taylor and W. Henning*, for appellee.

MCBRIDE, J.—The appellee, a railroad corporation, appropriated for the purposes of its roadbed, depot, station, shops, etc., certain land belonging to the appellant. The appropriation was made pursuant to the provisions <sup>Statement of of case.</sup> of sections 3906, 3907, Rev. St. 1881. Error is assigned on the action of the circuit court in sustaining demurrers to certain exceptions filed by the appellant to the award of the appraisers. The first exception is as follows: "Because the appraisers did not agree upon any award, but two of them fixed the amount of the damages at \$300, and the other one at \$1,438, so that there was no agreement of the said appraisers." This exception proceeds on the theory that the award of appraisers in appropriation proceedings, like the verdict of a jury, must be agreed to by all of the appraisers to be valid. Unanimity among the appraisers is not required. An appraisement concurred in by two is sufficient. Rev. St. 1881, § 240, cl. 2; *Piper v. Connersville & L. Turnpike Co.*, 12 Ind. 400; *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274; *Hays v. Parrish*, 52 Ind. 132; *Scraper v. Pipes*, 59 Ind. 158.

The third exception is as follows: "Because it does not

state the separate value of the parts of the lots taken, nor the separate value of the parts of the street taken, nor the separate value of the land from which the strip is appropriated." The land sought to be appropriated is a strip 40 feet wide, extending across two lots, both belonging to the appellant, and a strip 20 feet wide off of a street on which the lots abut, the portion of the street appropriated being adjacent to the lots. The objection, it will be observed, is, not that the appraisers did not separately consider the effect of the appropriation upon the several tracts, but that in their award they did not itemize the damages. The court did not err in sustaining the demurrer to this exception. While it was the duty of the appraisers to consider all of the effects of the proposed appropriation on each tract of land affected, they were not required to itemize and separately state the damage to each tract. An award of a sum in gross, covering all of the damages to all of the several tracts, was sufficient.

The fourth exception is as follows: "Because it is not shown upon the face of the proceedings that the appraisers or arbitrators were qualified under the law, in this: that it is not shown by such proceedings that such appraisers or arbitrators did not own land within one mile of any part of the said railroad for which the said strip of land is appropriated." This exception contains no allegation that either of the appraisers was disqualified. The only objection is that the record does not affirmatively show that they were qualified. In the absence of any specific averment to the contrary, it will be presumed that the appraisers possessed the necessary qualifications. *Turpin v. Eagle Creek, & L. W. L. Gravel R. Co.*, 48 Ind. 45. If they did not, that fact must be averred and proven by the party attacking the award.

The fifth and sixth exceptions present the same question. Both allege that it is not shown by the award that the appraisers considered the damages that might accrue to the appellant because of certain specific facts. The objection is not to what the appraisers did or failed to do, but to the form of the award: that it does not affirmatively appear from the award that the appraisers considered and awarded damages because of increased danger from fire; because of damage to storage, wharfage, etc. The appraisers were required to consider and to award compensation for all damages, of every character, which would be sustained by the appellants by reason of the appropriation of the land to the uses contemplated. They are not, however, required to itemize their award, and show how much they allow for increased danger

from fire, how much for noise, how much for smoke and cinders, how much for broken rest, etc. It is sufficient if, having fully and fairly considered all of the effects of the proposed appropriation, they award a sum in gross sufficient to compensate the owner of the land.

In our opinion, the court did not err in its rulings on any of the questions presented.

Judgment affirmed, with costs.

**Eminent Domain—Requisites of Application for Commissioners to Appraise Damages—Appeal from Award.**—Application to the county judge for the appointment of commissioners to appraise the damages sustained by a land owner by reason of the location of a railroad across his premises is required to be in writing, and should state the name of the corporation; the land owner, if known; a description of the real estate over which the road is located; the width required for right of way; and that the owner refuses to grant the same. The application must be signed by some person empowered by the corporation so to do, but it need not be dated nor verified, nor is it essential to jurisdiction that it should aver the act of incorporation of the railroad company. Before a railroad company can have the damages of a resident land owner appraised, 10 days' notice in writing must be first given the owner or guardian, either by personal service, or by leaving a copy thereof at his usual place of residence, unless waived. And where a land owner takes an appeal from the award of commissioners appointed to assess damages for right of way, he waives all objection as to notice, and that the appraisers were not properly sworn. *Trester v. Missouri Pac. R. Co.* (Neb. Oct. 7, 1891) 49 N. W. Rep. 1,110.

**Same—Sufficiency of Description of Tract.**—A petition for the appointment of a commission to appraise damage for the taking of property for right of way, which sets forth that the petitioner desires to acquire a strip 100 feet wide through a particular tract, and refers to an accompanying plat for a more particular description, is sufficient. *Fremont, E. & M. V. R. Co. v. Matthies* (Neb. June 11, 1892) 52 N. W. Rep. 698.

**Same—Statement as to Location of Route.**—Where a statute (Rev. St. Wis. § 1846) under which condemnation proceedings were instituted, requires the petition of the railroad company seeking to take lands for its own use, to state among other things, "that the route of said road has been located by its board of directors upon the line so staked out, and that the land so described is required for the purpose of constructing and operating said road," a petition which states merely that the company has established and surveyed its road over lands sought to be acquired for its main line and has actually staked out the centre line of its proposed road over lands desired for such railroad, is not sufficient to confer upon the court jurisdiction for the appointment of commissioners to assess damages, and in such a case even if the owner of the land is present and participates in the hearing at the time the commissioners were appointed by virtue of said petition, and subsequently appeals from their decision, he does not thereby waive his right to appeal from the order appointing them. *Winnebago Furniture Manuf'g Co. v. Wisconsin Midland R. Co.*, (Wis. Feb. 23, 1892) 51 N. W. Rep. 576.

**Qualification of Commissioners Cannot be Taken Advantage of Collaterally.**—The fact that the record of the condemnation proceedings does not show that any evidence was offered establishing the qualifications of the commissioners appointed to make an appraisal and an assessment of damages cannot be taken advantage of in a collateral proceeding. The

court said: "It is contended that there is no evidence tending to show that the commissioners appointed were freeholders. The order appointing them recites that they are. Even if they were not, the case of *Huling v. Kaw River R. & Improvement Co.*, 130 U. S. 559, 39 Am. & Eng. R. Cas. 52, is conclusive authority that such an objection cannot be raised in a collateral attack on the condemnation proceedings." *Chicago K. & N. R. Co. v. Griesser*, (Kan. May 7, 1892) 29 Pac. Rep. 1082.

**Effect of Illegal Appraisement on Possession of Railroad.**—Where the charter of a railroad company requires, in proceedings to condemn land, that in order to obtain title or seisin of the lands to be taken, it is necessary that the survey should be recorded and that the land should have been legally appraised, and the money to pay the appraised damages to be paid or deposited for payment, *held*, where these requirements are only fulfilled as far as the recording of the survey and award, the possession of the railroad is confined to the land actually occupied, and does not extend to the limits of the survey. The court said: "The record of the award carried on its face notice to the company, and to all who took any interest in the road from the company, that the proceedings of the commissioners were without legal force, from the failure of the commissioners to give the required notice, and to acquire jurisdiction to proceed with the appraisement. But the defendant contends that by taking possession of the lands of Walter Ross, by constructing their road thereon, and by having recorded their locating survey and this award, their possession extended constructively to the limits of the survey. By the seventh section of the charter the company did not obtain title or seisin of lands attempted to be condemned by recording the survey. That was but one of the required steps. It must also have it legally appraised, and the money to pay the appraised damages must be paid or deposited agreeably to the act. When all this was done agreeably to the charter, it is declared, 'then said corporation shall be deemed seized and possessed of such lands so appraised by said commissioners.' Hence the defendant's and their successors' possession did not extend beyond such lands of Walter Ross as it actually occupied; and by his possession of that portion of the land covered by the locating survey and award of the commissioners, occupied by Walter Ross, he occupied in his own right. When, therefore, the plaintiffs entered, subsequently to making the award, into an agreement with the defendant that he should receive the sum awarded for the land actually fenced and occupied by the defendant for the purposes of its railroad, the parties stood upon that agreement alone, and the possession of each was notice to all of their respective rights. Their respective possessions indicated to all the world their respective rights against each other. Neither party could convey any greater rights than his possession indicated." *Croft v. Bennington & R. R. Co.*, (Vt. Feb. 15, 1892) 23 Atl. Rep. 922.

**Effect of Notice as to Time and Place of Appraisal.**—The charter of a railroad company, in proceedings to condemn land for railroad purposes, required the commissioners appointed to appraise the damages of land taken to give 15 days' notice of the time and place of appraisal to both the railroad company and the owner of the land. Under the said charter the report of the commissioners recorded in a certain case stated, that after giving 3 days' notice to the railroad company and to R, the land owner, "the said R. did not appear, and having viewed the premises, and heard said parties in the matter," they made an award. *Held*, that the words "said parties" meant the parties who did appear for the railroad company, and that R. not having had the required notice, and not having appeared, the proceedings of the commissioners were without legal force to bind him. *Croft v. Bennington & R. R. Co.* (Vt. Feb. 15, 1892) 23 Atl. Rep. 922.

**Error in Court to Refuse to Hear Exceptions to Commissioner's Report.**

Under Code North Carolina, sec. 1946, which provides that "the court or judge on the hearing may direct a new appraisement, modify or affirm the commissioners' report or make such order in the premises as to him shall seem right and proper." *Held*, in special proceedings against a railroad company to assess damages on land taken for railroad purposes, where the defendant excepted to the commissioners' report on the ground that the damages were excessive, that it was error for the court to refuse to hear affidavits on the ground that it had no legal power to pass on them. The court said: "The statute (Code, § 1946,) provides that 'the court or judge on the hearing may direct a new appraisement, modify or confirm the report, or make such order in the premises as to him shall seem right and proper.' If, under the general statute regulating special proceedings, (Code, § 116,) the plaintiff had the right, before commissioners were appointed, to insist that the clerk should frame an issue involving the question of damages, and transmit the case to be tried in term time by a jury, he could not, after acquiescing in the order appointing commissioners, and thereby assenting to that mode of trial, reassert and enforce that right after waiving it, and when he discovered that under the mode of trial agreed to, if not selected by him, the findings were not so favorable to him as he had expected. *Chowan & S. R. v. Parker*, 105 N. Car. 246. 'The judge might have heard the affidavits, both of defendant and the plaintiff, as a help or guide in the exercise of the broad discretion given him by the statute. *Skinner v. Carter*, 108 N. Car. 206. While his refusal to hear them, nothing more appearing, is not necessarily reviewable in this court, as it would have been presumed that he did so in the exercise of the power conferred by the statute, it was error to refuse to hear the affidavits on the ground that he had no legal power to pass upon them. He had authority unquestionably to set aside the report, and to direct a new appraisement by the same commissioners, or others appointed in their stead, on the ground that he thought the damage assessed was excessive, even though we should concede that, under the ruling of this court in *Norfolk S. R. Co. v. Ely*, 101 N. Car. 11, the judge could no more modify the findings of the commissioners in that respect by substituting a smaller sum than he could make the same change in the verdict of the jury. *Skinner v. Carter*, *supra*; Code, § 1946. He was clothed with the discretionary power to confirm the report, if such course seemed to him in all respects fair and proper, or 'to make such order as seemed just,' though he could no more annul the order appointing the commissioners and then direct an issue to be tried by a jury than he could have vacated a consent order of reference when one of the parties objected. But when the judge could not have called a jury, in aid of his conscience, to find the facts, how could he ascertain whether it was his duty to set aside the report, and direct a new assessment by the same or other commissioners, or to remand the case again for a new assessment, as he might have done, (*Skinner v. Carter*, *supra*.) unless he was at liberty to hear testimony in the form of affidavits, as on a motion to grant or dissolve an order of injunction, or in other cases where he was empowered to review the facts?" *Hanes v. North Carolina R. Co.*, 109 No. Car. 490.

**Omission of Names from Judgment Confirming Commissioner's Report.**

It is unnecessary for a judgment in condemnation proceedings, to set out the names of the land owners, given in the commissioner's report, where it specifically refers to and confirms the report. The court said: "Plaintiff's name, and that of the trustee in the deed of trust, were omitted from the judgments of the court confirming the reports of the commissioners, and this is assigned for error. Upon examination of these judgments, we find that these reports were specifically referred to and confirmed, and,



this being so, we deem it unimportant that the names of the owners mentioned in the report should be given. But such a defect could have been cured by amendment, and is cured by the statute of jeofails, the whole record showing who the owners were." *Thompson v. Chicago, S. F. & C. R. Co.*, (Mo., March 2, 1892,) 19 S. W. Rep. 77.

**Powers of Commissioners in Assessing Damages - Time of Original Entry.**—Under the charter of the Camden & Atlantic Railroad Company, (Pamph. Laws (N. J.) 1852, p. 263,) providing that when the compensation for land taken cannot be determined by agreement with the owner, commissioners appointed to view and appraise the land shall "assess the value of said lands or materials and damages sustained," the commissioners must award the present value of the land and the damages incident to the construction of the road, and have no authority to take the testimony of witnesses, determine whether the original entry, made many years before, was legal, and assess the damages as of the time of such original entry. *Leeds v. Camden & A. R. Co.*, (N. J., Nov. Term, 1890,) 23 Atl. Rep. 168.

**Recording Appraiser's Award.**—Where an original order confirming an award in condemnation proceedings of land by a railroad company, was delivered by counsel for the company, to the county clerk, who recorded it at full length in a separate book, kept for such orders, the company will not be permitted, in an action on the award, to claim that the recording should have been of a certified copy instead of the original and should have been recorded in the book of deeds. *Morgan v. New York & M. R. Co.*, 130 N. Y. 692.

**Recording Order of Award—Allegation in Complaint.**—Where a statute required an order of award made in condemnation proceedings to be "recorded" before the right of the land owners to sue accrued, and made it the duty of the railroad to pay the same, an allegation in the complaint by the owners to recover the award, that the order had been "entered" was held equivalent to an allegation that the order had been "recorded," when taken in connection with a subsequent reference to the "record" of such order. *Lent v. New York & M. R. Co.*, 130 N. Y. 504.

**Death of Commissioner—Filling Vacancy.**—In New Jersey upon the death of a commissioner to condemn lands in favor of a railway, such vacancy can be filled by force of Act, March 11, 1891, such act being constitutional. *State (United New Jersey R. & Canal Co.) v. National Docks & N. J. J. Canal Co.*, (N. J. Feb. 29, 1892,) 23 Atl. Rep. 686.

**Liability of Company for Commissioner's Fees.**—Under Revised Statutes Wisconsin, sec. 1848, which expressly provides that in condemnation proceedings "the commissioners shall be entitled to such compensation as the court may direct which shall be paid by the railroad corporation," and the provision in sec. 1852, that "in every such case the party interested in such lands may institute and conduct the proceedings to a conclusion if the corporation delays or omits to prosecute the same, at its cost and expense," the mere fact that the land owner instituted the proceedings did not take away or change the liability of the company, and it may be required to pay the fees of the commissioners as soon as their services are performed, and the amount thereof is fixed by the court, notwithstanding an appeal by the railroad company denying the existence of the land owners' title to the *locus in quo*. The court said: "In the order of January 3, 1891, appointing commissioners in the case at bar, the court determined that the petitioner had title to the *locus in quo*. The award of damages was made on that theory by the commissioners February 3, 1891. The plaintiff contends that such determination of his title is conclusive upon the company. But the company appealed from that award February 10, 1891, and now contends that the petitioner's title is still open for final determination upon such appeal. It is to be regretted that the statute does not

prescribe the time and manner for determining such contested title. Neither of these contentions are before us for determination on either of these appeals. The question here is whether the court properly ordered the company to pay the fees of the commissioners May 18, 1891, and whether the court properly refused to modify that order June 13, 1891. The statute expressly provides that 'the commissioners shall be entitled to such compensation as the court may direct, which shall be paid by the railroad corporation.' Section 1848, Rev. St. Under this statute, and where the company institutes the proceedings, it may certainly be required to pay the commissioners' fees as soon as their services have been performed, and the amount of their compensation is fixed by the court. So the statute provides that 'in every such case the party interested in such lands may institute and conduct the proceedings to a conclusion, if the corporation delays or omits to prosecute the same, at its cost and expense.' Section 1852, Rev. St. The mere fact that the land owner instituted the proceedings does not, in our judgment, take away nor change the liability of the company. It still may be required to pay the fees of the commissioners as soon as their services are performed and the amount thereof is fixed by the court. The order of January 3, 1891, and the appointment of commissioners, is at least *prima facie* evidence that the title to the *locus in quo* was in the petitioner. The commissioners, having performed such services under such order, were entitled to their pay. The statute required the company to pay them as ordered; and the mere fact of the appeal from the award and the denial of such title did not make it improper for the court to make and enforce the order. Whether the company can recover back the fees so paid in case it should finally succeed in defeating the petitioner's title to the *locus in quo* is a question not here presented." *Taylor v. Chicago, M. & St. P. R. Co.*, (Wis., Jan. 12, 1892,) 51 N. W. Rep. 93.

**Award of Damages by Arbitrators.**—In a case of an award in expropriation proceeding under the Railway Act, R. S. C. chap. 109, it was held by two courts that the arbitrators had acted in good faith and fairness in considering the value of the property before the railway passed through it, and its value after the railway had been constructed; and that the sum awarded was not so grossly and scandalously inadequate as to shock one's sense of justice. *Held*, on appeal to the Supreme Court of Canada, that the judgment should not be interfered with. *Benning v. Atlantic & Northwest R. Co.*, 20 Can. Sup. Ct. Rep. 177.

## WICHITA &amp; WESTERN R. CO.

v.

FECHHEIMER.

*(Kansas Supreme Court, Oct. 8, 1892.)*

**Amending Petition Filed Against Railroad for Taking Land.**—The defendant in error, plaintiff below, filed in the court below a petition, an amended petition, and a second amended petition. What the allegations of the original petition were is not shown. The allegations of the amended petition are to some extent indefinite, but the allegations of the second amended petition clearly constitute a cause of action in favor of the plaintiff below and against the defendant below for a permanent taking and appropriation by the defendant below of a portion of the plaintiff's land for railroad purposes, and also constitute causes of action in favor of the plaintiff below and against the defendant below for trespasses upon such land. *Held*, that the supreme court cannot say that there was any substantial departure in the second amended petition from the allegations of the other pleadings as to the facts stated, or that the court below erred in permitting the plaintiff below to file her second amended petition.

**Damage to Land by the Extension of Embankment.**—Where a railroad company, in constructing its railroad, constructs an embankment upon which it places its railroad tracks, and the railroad tracks are not placed upon the plaintiff's land, but the embankment extends over and upon the plaintiff's land, and occupies a portion thereof of about 8 feet in width by 450 feet in length, *held*, that the plaintiff may maintain an action against the railroad company as for a permanent taking and appropriation of a portion of her land, and for damages to the extent of the depreciation in value of her land caused by such taking and appropriation.

**Misconduct of Jury by Accepting Gifts.**—The plaintiff furnished to the bailiff a box of cigars, and he distributed them to such of the jurors as desired to take them. *Held*, under the circumstances of the case, that the supreme court cannot say that the court below erred in overruling the defendant's motion for a new trial, founded upon the ground of this furnishing and distribution of cigars.

ERROR from Sedgwick District Court.

Action for appropriating certain land.

This was an action brought, at some time not shown, in the district court of Sedgwick county by Gettie Fechheimer against the Wichita & Western Railroad Company. After judgment in that court in favor of the plaintiff and against the railroad company for \$1,400, the case was brought by the railroad company to the supreme court, in which court the judgment of the district court was reversed, and the case remanded for another trial. *Wichita & W. R. Co. v. Fechheimer*, 36 Kan. 45. After its return to the district court, the plaintiff filed an amended petition, and afterwards, with leave of the court, filed a second

Statement of  
case.

amended petition. In the second amended petition the plaintiff alleged, among other things, that she was the owner of certain real estate described therein; that the railroad company, about August 15, 1883, permanently constructed its railroad across such land, and committed various wrongs and trespasses with respect thereto, to the great injury of the plaintiff. This second amended petition contains five counts and five supposed causes of action. The defendant filed an answer to this second amended petition, which answer contains a general denial, and also contains, among others, allegations that the property appropriated by the railroad company was a public street in the city of Wichita, known as "Orme Street," which the railroad company was permitted to occupy under and by virtue of certain city ordinances, and that none of the land entered upon or injured by the railroad company belonged to the plaintiff, and that each of the several causes of action alleged in the second amended petition had accrued more than two years prior to the filing of such petition. To this answer the plaintiff filed a reply containing a general denial.

Upon these pleadings a trial was had before the court and a jury, and the jury rendered a general verdict in favor of the plaintiff and against the defendant, assessing the plaintiff's damages at \$1,500; and also, in answer to the following special questions of fact, returned the following answers, to wit: (1) Is it not a fact that Starr and Burris, contractors, cut down, or caused to be cut down and destroyed, the hedge and the fruit trees, and built the embankment in question? Answer. Yes. (2) What amount of damages, if any, in your general verdict, do you allow for the destruction of the hedge? A. None. (3) What amount of damages, if any, do you allow for the destruction of the cottonwood trees and for the destruction of the shade trees? A. None. (4) What amount of damages, if any, do you allow in your general verdict for the destruction of the fruit trees? A. None. (5) What portion of the plaintiff's cabbages and tomatoes would have been destroyed by the freshet had not the embankment been built? A. We do not know. (6) What proportion of the embankment is on the twenty-five foot strip of the premises claimed by the plaintiff? A. Eight feet wide by 450 feet long on west end. (7) What amount of damages, if any, in your general verdict, by reason of the pulling up and injuring the wire fence? A. None. (8) Is it not a fact that the center line of the railroad track is 9½ feet south of where the hedge was claimed by the plaintiff as being on the south side of her premises? A. Yes. (9) In operating the trains over the track, what portion of said train,

if any, touches the plaintiff's premises? A. None. (10) What amount of damages, if any, in your general verdict, do you allow by reason of noise, dirt, smoke, shaking of ground, whistling, and ringing of bells in the operating of defendant's train over said track? A. None. (11) What amount of damage, if any, do you allow in your general verdict by reason of the ponds of water that have been flowed back upon plaintiff's premises? A. None. (12) Was there a mistake in the description of the south boundary of plaintiff's premises in the original deed from Greenway to the plaintiff which was mutual to Mr. Greenway and to the plaintiff? A. Yes. (13) If you answer the last question 'Yes,' when did such mistake come to the knowledge of the defendant? A. We do not know. (14) Does Mr. Greenway admit that there was such a mistake? A. Yes. (15) Is it not a fact that on the 6th day of August, A. D. 1883, the said city, by its mayor and common council, opened and extended, for the purpose of improving the same, a certain street in said city known as 'Orme Street?' A. Yes. (16) If you answer the last question in the negative, when did they open it up, if at all? A. We do not know. (17) Is it not a fact that said Orme street extended beyond, and directly on the south, and contiguous to, the premises described in the plaintiff's petition? A. No. (18) Was the railroad built on the south of the plaintiff's premises built mainly on Orme street? A. No. (19) If you answer the last question in the negative, on what premises was that portion of the railroad lying immediately south of plaintiff's premises built? A. A. J. Greenway's. (20) Is it not a fact that said Orme street was opened, widened, and extended to the Arkansas river some time during the month of August, 1883? A. No. (21) Did the city of Wichita, by its mayor and common council, by an ordinance enacted and passed on the 19th day of July, 1883, grant to the defendant the right to construct a railroad track down Orme street from the east line of said city due west on the Arkansas river? A. We find that the mayor and the common council of the city of Wichita passed an ordinance of this character, but we further find that Orme street was not opened from Water street to the Arkansas river; that part of said ordinance relating to that part of Orme street is invalid. (22) When was the said Orme street extended to the Arkansas river, if at all? A. We do not know. (23) When was the said Orme street occupied by defendant, if at all? A. We do not know. (24) What portion of plaintiff's premises, if any, was actually occupied by the defendant the time of the commencement of the action or before, if any? A. Eight feet by 450 feet on north side of embankment on west end

of premises. (25) What portion of the damages, if any, do you allow plaintiff in your general verdict for the destruction of the hedge fence and trees by the defendant? A. None. (26) What portion of the damages do you allow the plaintiff in your general verdict by reason of the occupation of a portion of the premises by the defendant, if any? A. None. (27) What damages do you allow in your general verdict by reason of the alleged overflow of plaintiff's premises and the destruction of the garden, if any? A. None. (28) Is it not a fact that the only portion of defendant's railroad which is actually upon the twenty-five foot strip claimed by the plaintiff to have been appropriated by the railroad is the earth on the north side of an embankment, which spreads out on the average of about eight feet in width for about 450 feet on the west side of plaintiff's premises? A. Yes. (29) Is it not a fact that no part of the ties or rails of the said railroad is upon plaintiff's premises? A. Yes. (30) What amount, if any, do you allow in your general verdict for the strip of earth in the embankment which is on the twenty-five foot strip in question? A. None. (31) Was the bridge and the embankments approaching the bridge properly constructed? A. We do not know. (32) If you answer the last question in the negative, state in what respect said embankment and bridge were not properly constructed. A. We do not know."

The court rendered judgment in favor of the plaintiff and against the defendant, in accordance with the general verdict, and the defendant, as plaintiff in error, again brings the case to this court for review.

*George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error.*

*Stanley & Hume, for defendant in error.*

VALENTINE, J.—The amount of the plaintiff's recovery in this case in the court below was, as will be seen from the verdict, the special findings, and the judgment of the court below, the amount of the depreciation in value of the plaintiff's land caused by the permanent taking and appropriation by the railroad company for railroad purposes of a portion of such land, and nothing was recovered for the value of the land actually taken, or for any trespasses or other wrongs of a temporary character committed upon the land. The judgment was for \$1,500, which was intended to be compensation only for the depreciation in value of the plaintiff's land caused by the construction and operation of the railroad.

The first alleged error is as follows: "The court erred

in permitting the plaintiff to amend her petition by changing her cause of action from a trespass and substituting therefor a cause of action for compensation for the taking and appropriation of a strip of land."

Amending petition.

What the plaintiff's original cause or causes of action was or were we cannot tell, for no copy of her original petition is contained in the record brought to this court. Probably, however, from a report of the case as it was tried upon the original petition and as found in 36 Kan. 45 *et seq.*, and also as indicated by a motion of the plaintiff in error, defendant below, filed in the district court after the case was returned from the supreme court to that court, and now found in the record, it might be inferred that such original petition contained allegations sufficient to authorize a recovery for damages resulting from either a permanent taking and appropriation of a portion of the plaintiff's land or for trespasses committed thereon.

A portion of the original petition is contained in 36 Kan. 46, 47; and the judge of this court, in delivering the opinion of the court, used the following, among other, language with respect to such original petition: "She [the defendant in error, plaintiff below] now says that she elected to bring her action for a permanent appropriation and injury, and tried the case upon that theory; and probably the allegations of the petition may be regarded as sufficient to accomplish that purpose." 36 Kan. 49. The said motion reads as follows: "Comes now the defendant, and by leave of the court moves the court to require the plaintiff to amend her petition filed in said cause, and make the same more definite and certain in the following respects, to wit: To show the nature of her action by alleging whether the same is for a permanent appropriation of the land described in said petition or for trespass thereon." The defendant in error, plaintiff below, in response to this motion, filed an amended petition, stating a cause of action, possibly both for permanently taking and appropriating a portion of her land for railroad purposes, and also for trespasses thereon, though it is not clear that the petition stated a cause of action for a permanent taking and appropriation of a portion of the plaintiff's land. Afterwards the plaintiff, with leave of the court, filed a second amended petition, the one now in question stating a cause of action for a permanent taking and appropriation of a portion of her land, and also for causes of action for trespass upon such land.

We cannot say that the court below erred in permitting the plaintiff to file her second amended petition. Probably all the petitions filed by her stated substantially the same facts, and probably no one of them as to the facts

stated was a great departure from the preceding one or ones, and it is the facts stated which constitute the cause of action. A prayer for relief never constitutes a part of the cause of action. Under the allegations of the original petition, the plaintiff probably had a right to prove a permanent appropriation by the railroad company of a portion of her land, and to recover damages for the permanent appropriation thereof; and the original trial was conducted upon that theory, as is shown in 36 Kan. 48 *et seq.* Under the allegations of the second petition, which was the first amended petition, it is more questionable. The facts stated are probably sufficient, but the prayer for relief is indefinite. Under the allegations of the third petition, which was the second amended petition, and the one now in dispute, there can be no doubt. Under all the facts and circumstances of this case, we cannot say that the court below committed any error in permitting the aforesaid amendment.

Second amended petition.

Third amended petition.

The next alleged error is as follows: "The plaintiff cannot recover compensation for a permanent appropriation, because, *first*, the railroad company does not and has not occupied with its tracks any land belonging to plaintiff; *second*, because, before the filing of the amended petition, the land was condemned by the city as a street, and the occupation of the street by the railroad company was legalized by ordinance." It is true that the railroad tracks do not occupy any portion of the plaintiff's land, but these tracks were constructed upon an embankment which extends over and upon the plaintiff's premises, and occupies a portion thereof of about 8 feet in width by 450 feet in length; and if the railroad is to be considered a permanent thing, which undoubtedly it is, then the use of this strip of the plaintiff's land by the railroad company by occupying it for embankment purposes must also, in the nature of things, be considered as a permanent use thereof, and as a permanent taking and appropriation thereof. There are some facts connected with this case which ought to have been shown, but which are not shown, or at best are not definitely shown. It would seem, however, from the pleadings, the evidence, and the findings of the jury, that the principal facts are substantially as follows: The land now in question belonged originally to A. J. Greenway. In 1872 he sold and intended to convey it to the plaintiff, Mrs. Fechheimer, but, through a mutual mistake of the parties in describing the land in the deed of conveyance, it was not conveyed. Mrs. Fechheimer, however, took the actual possession of the land, and continued to hold the same until the railroad company de-

Extension of embankment on land.



prived her thereof, in August or September, 1883. The land was, of course, hers when the railroad company took the possession thereof, notwithstanding the mistake made in the deed of conveyance.

How soon after the time when the railroad company took the possession of the land the plaintiff commenced this action is not shown. The action may have commenced early in August, 1883. On August 6, 1883, proceedings for the condemnation of the land for the extension of Orme street, a public street in the city of Wichita, were commenced by such city, and the appraisers for that purpose filed their report on September 3, 1883. It does not appear that Mrs. Fechheimer ever had any notice of these proceedings, or that she ever received any compensation under them for any portion of her land. There were also other irregularities in these proceedings, which it is not necessary to mention. On October 4, 1883, Greenway, in order to correct his prior intended conveyance of the property to Mrs. Fechheimer, executed to her a quitclaim deed for the property. On December 26, 1887, the city of Wichita gave to the railroad company the privilege of occupying Orme street in such city. The railroad company, however, had already been occupying the plaintiff's land for more than four years. On October 25, 1888, the plaintiff filed her second amended petition. Now, it is not shown that the extension or opening of Orme street was legal or valid as against the plaintiff, but still, if it was, the defendant did not obtain any right to occupy this extension until December 26, 1887. The strip taken by the railroad company was 8 feet wide by 450 feet long; and the plaintiff below claims that this was never any part of Orme street even if Orme street was ever legally extended and opened. In her counsel's brief it is said, among other things, as follows: "It is not necessary to consider whether Orme street was opened by the city, for the company occupied a portion of the land of plaintiff beyond the limits of Orme street as finally opened." We cannot say that this claim of the plaintiff below, defendant in error, is not true, but, even if it were not true, still, under the facts of this case, we could not say that Orme street was legally extended or opened, or, if legally extended and opened, that it was so extended and opened before the commencement of this action; and we cannot sustain this claim of the plaintiff in error.

It is further claimed that the court below erred in the admission of evidence, and in giving certain instructions to the jury; but the claim of error in these respects is founded principally upon the further claim that the railroad company

did not occupy any portion of the plaintiff's land, which as a fact is not true. The railroad company did as a fact occupy a portion of the plaintiff's land, and therefore these claims must be considered as untenable. This fact gives the plaintiff the right to recover damages as for a permanent taking and appropriation of a portion of her property. She may recover for the depreciation in the value of her property caused by the permanent taking and appropriation of a portion thereof.

It is further claimed by the plaintiff in error under the title "misconduct of the jury," that the court below erred in refusing to grant to the defendant below a new trial. The facts upon which this supposed "misconduct of the jury" is founded are as follows:

Misconduct of jury.

The jury were permitted to view the premises where the railroad was constructed across the plaintiff's land, and while there, and at the plaintiff's residence, she handed to the bailiff a box of cigars, and he distributed them to such of the jurors as chose to accept them. The detailed facts as shown by the evidence are as follows: Mrs. Fechheimer and her husband resided upon the land. He was a dealer in cigars. While the case was pending in the court below, and before the trial, there was an uncertainty as to when it would be called for trial, and Fechheimer asked the bailiff to inform him with respect thereto, and the bailiff agreed that he would do so, and Fechheimer agreed that he would give to the bailiff a box of cigars. While the bailiff was conducting the jury from the court room to the premises, some of the jurors suggested that they ought to have cigars, and he informed them that he would furnish them with cigars when he reached the plaintiff's house. Reaching the plaintiff's house, and finding no male person about the premises, he requested Mrs. Fechheimer to give him the cigars, which she did. He then distributed a portion of the cigars, and handed the box back to her, and one or more of the jurors afterwards took one or more of the remaining cigars from the box while she held it. He stated to the jurors at the time that it was his treat. During all this time not one word was said about the case, and nothing further was said or done that might in the least have influenced the jury concerning the case, and the testimony of the only jurors who testified in the case tends to show that the jury was not influenced by anything that was said or done at that time. No one at the time thought of there being any impropriety in the transaction, or of its having any influence upon the jury. Now, while the giving of cigars by a party to a jury, or to any member thereof, during the progress of a trial, is always improper and generally reprehensible, yet, unless such conduct may have influenced

the jury in some manner, it should not destroy their verdict afterwards rendered. In this case nearly all the evidence concerning this matter was in parol, and it was heard by the judge of the trial court, who heard all the testimony given during the whole progress of the case, and evidently he did not believe that the transaction with reference to these cigars had any influence upon the verdict of the jury, and we think it should not have had any such influence, and therefore, with some hesitancy and some reluctance, we must say that we cannot hold that the court below erred in overruling the defendant's motion for a new trial founded upon this ground.

After a careful examination of this entire case and of all the points presented by counsel for the plaintiff in error, we are of the opinion that no substantial error was committed by the court below, and therefore its judgment will be affirmed. All the justices concurring.

**Misconduct of Viewers, Jurors and Commissioners in Condemnation Proceedings.**—This subject was considered in the note to Louisville, St. L. & T. R. Co. *v.* Barrett (Ky.), 47 Am. & Eng. R. Cas. 174-178.

**What Constitutes Taking—Unintentional Trespass.**—In *Morris v. Wisconsin Midland R. Co.* (Wis., June 15, 1892,) 52 N. W. Rep. 758, where a railroad company instituted proceedings to condemn land for its own use, and afterwards discontinued them, as it had a right to do, the court held that where they unintentionally encroached upon the land by their track, but removed same upon the discovery of the encroachment, it amounted only to a simple trespass and not to a taking thereof. The court said: "The institution of condemnation proceedings by the company in August did not constitute a taking, because the company had discontinued them so far as lot 22 is concerned. This they had a right to do. *Lewis, Em. Dom.* §§ 655, 656; *Driver v. Western Union R. Co.*, 32 Wis. 569-583. The fact that when the track was first laid the eaves of a passing car would extend a few inches over the petitioner's west line does not constitute a taking in view of the facts in evidence. It is clear that the respondent did not intend to encroach on petitioner's land, and when it found that it had, it speedily removed its track. Under these circumstances, we think, there was simply a trespass. Respondent had the right to cease trespassing. It does not appear that it will now be necessary for the company to encroach on petitioner's land for the purpose of excavation or embankment or passageway for its cars. The claim that appellant is entitled to damages under chapter 255, Laws 1889, cannot be maintained. The utmost that can be claimed as to the alley is that the sides or eaves of a passing car may extend a few inches over the south half of the alley opposite appellant's lot east of a continuation of his west line, and that a few inches of filling may there be necessary for the convenience of travel. We shall spend no time discussing this question. It cannot be seriously claimed that either of these facts would constitute obstruction or use of the alley which would appreciably damage appellant's property."

**Possession by Trespass Before Condemnation Proceedings Instituted.**—In condemnation proceedings, under N. Y. Code Civil Proc. § 3379, "the court may authorize plaintiff, at any stage in the proceedings, if in possession of the property sought to be condemned, to continue in possession," but where the possession of a railroad originated in a trespass, known to the company to have been such, and was taken without color of

authority, or under no mistake, such company is not within the above section of the code, and the plea of public necessity, in such case, though well founded, is of no avail, the interests of the public having been provided for by section 3380 of the Code. *In re* St. Lawrence & A. R. Co.; *In re* De Camp (New York, May 24, 1892,) 31 N. E. Rep. 218.

**Rights in Property Acquired by Condemnation.**—Where a railroad company has acquired land by condemnation, it has such an ownership therein as will entitle it to damages for the destruction of a street upon which it abuts. *Pennsylvania Schuylkill Valley R. Co. v. Reading Paper Mills* (Pa., May 9, 1892,) 24 Atl. Rep. 205.

## BALTIMORE BELT R. CO.

*v.*

BALTZELL, *et al.*

(*Maryland Court of Appeals, Dec. 10, 1891.*)

**Eminent Domain—Summoning of Special Jury—Notice.**—When, under the statute, there is a failure to agree between a railroad company and the owner of land needed for the construction of the road, the amount of damages the owner is entitled to, is determined by a jury of twelve remaining from a jury of twenty summoned to meet on the premises, from which the owner and the railroad company shall each strike off four names (Code, Art. 23, § 167). *Held*, that the statute implies that the company shall first give notice.

**Sufficiency of Notice to Admit Evidence of Damages.**—Such reasonable notice is required as will allow the owner sufficient time to offer such evidence as may be necessary on the question of damages.

**Due Process of Law—Special Jury.**—The provision in the Maryland constitution that no law shall authorize the taking of private property without compensation agreed upon or awarded by a jury, does not relate exclusively to the common law jury, inasmuch as special juries to determine the amount of damages to be awarded for land taken were recognized by statute long prior to the adoption of the constitution; consequently, Art. 23, § 167 of the Code is not unconstitutional.

APPEAL from Baltimore City Circuit Court.

Bill to restrain proceeding to condemn certain real estate. From an order restraining defendant it appeals.

Argued before ALVEY, C. J., and IRVING, BRYAN, MCSHERRY, FOWLER, and ROBINSON, JJ.

*John K. Cowen, William A. Fisher, W. Irvine Cross, and H. L. Bond, Jr.*, for appellant.

*Arthur W. Machen, J. Wilson Leakin, and H. E. Baltzell* for appellees.

ROBINSON, J.—This is a bill to restrain the appellant, a railroad company, from proceeding to condemn certain real estate held by the appellees as trustees. The company's powers of condemnation are derived from section 167, art. 23, of the Code, which provides, in the first place, that the company may agree with the owner for the purchase of any property which may

Company's  
power of con-  
demnation.

be needed for the construction of its road, and, if the owner be an infant, *non compos* or a married woman, or a non-resident, application may be made by the company to a justice of the peace, who shall thereupon issue his warrant to the sheriff of the county, requiring him to summon a jury of twenty, qualified to act as jurors under the laws of the state, to meet on the premises on a day named in said warrant, and, from the panel thus selected, the company and the owner may each strike off four persons, and the remaining twelve shall act as "the jury of the inquest of damages." It further provides that the jury shall reduce their inquisition to writing, and sign and seal the same, and that it shall then be returned by the sheriff to the clerk of the circuit court, and shall be confirmed by the court at its next session, unless cause to the contrary be shown.

This statute, it is contended, is in violation of the constitutional rights of the land owner as guarantied by the constitution of this state, which declares that, no one ought "to be deprived of life, liberty, or property but by judgment of his peers, or by the law of the land;" and as guarantied also by the constitution of the United States, which declares that no state shall pass any law "to deprive any person of life, liberty, or property without due process of law." Fourteenth Amend. Const. U. S. "The law of the land" and "due process of law," as here used, it can hardly be necessary to say, mean the same thing. It is in violation of these constitutional limitations, it is argued, because no provision is made by the statute for notice to the owner; and that the taking of one's property for a public use, without notice, and an opportunity to be heard, cannot be considered "due process of law" within the meaning of the constitution. Now, what constitutes "due process of law" has been the subject of a good deal of consideration, not only by the courts of this and other states, but by the supreme court of the United States also, especially since the adoption of the fourteenth amendment; and after all that has been said and written, it may not be easy to define it so as to embrace every case. Generally speaking, however, due process of law may be said to mean a course or mode of proceeding according "to the well-settled maxims of law, and under such safeguards for the protection of individual rights as such maxims prescribe for the class of cases to which the one in question belongs." All agree that it does not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. *Davidson v. New Orleans*, 96 U. S. 97. On the contrary, in the leading case of *Murray's Lessee v. Hoboken*

Land & Improvement Co., 18 How. (U. S.) 272, where the property of a defaulting public officer was sold under a distress warrant issued by the secretary of the treasury in pursuance of the act of congress, the proceeding was held to be due process of law because it was in conformity with the usual and customary proceeding in such cases, recognized alike by the common law and the statute law of England. After stating that the phrase was equivalent "to the law of the land," and that its meaning was to be ascertained from the practice of the English courts and from the English statutes subsequent to the time of the *Magna Charta*, Mr. Justice CURTIS says: "Though due process of law generally implies and includes *actor reus judex*, regular allegations, opportunity to answer, and a trial, according to some settled judicial proceeding, yet this is not universally true. There may be, and we have seen that there are, cases under the law of England after *Magna Charta*, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial." But there is a wide difference between the summary process sanctioned by the common law for the collection of the public revenue, and the taking of one's property under the power of eminent domain for a public use.

And we think it may be safely said that there never has been a time in the constitutional history of England, much less in this country, when one could be lawfully deprived of his property for a public use without Notice essential. notice and an opportunity to be heard. There was, it is true, an *ex parte* proceeding under the ancient writ of *ad quod damnum*, issued by the court of chancery, in pursuance of an act of parliament passed in 1299, by which the sheriff was directed to summon a jury to inquire whether a grant to a religious use would be to the damage of the king and others. And this writ was, in the course of time, used in the condemnation of private property for public uses. And, although the writ issued upon an *ex parte* application, yet, if the inquisition was found, and the property condemned without notice to the owner, this in itself constituted a sufficient ground to setting aside the inquisition. As far back as *Venor's Case*, 3 Atk. 766, where an application was made to quash the writ, Lord HARDWICKE said: "The only proper question is whether there has been any surprise on the execution of the writ or the persons petitioning, by preventing them from laying the evidence before the jury at the time of the inquisition, or before the justices on appeal." And this writ, it appears, was also used during the colonial government, especially for the condemnation of mill-seats and other

like public uses, but the inquisition as found was always subject to be set aside for any reason that would have been sufficient to quash the writ at common law. So whatever conflict of opinion there may have been in the Johns Hopkins Hospital Case, 56 Md. 1, and in Ulman's Case, 72 Md. 609, on the part of this court as to the necessity of notice in the exercise of the taxing power, we all agree that in taking property under the power of eminent domain the owner is entitled to notice and the opportunity to be heard. And the learned judge below, and Mr. Lewis in his treatise on Eminent Domain, have both fallen into error in construing the Case of George's Creek Coal & Iron Co., 40 Md. 426, as a decision to the contrary. In that case the land owner not only had notice, but was heard by the jury of inquest, and the inquisition was set aside by the court for the reasons set forth in the petition filed by the owner. Subsequently, the court directed a new inquisition, and the owner moved to quash the new writ on the ground that it was issued by the court without notice. And upon this motion the court decided that owner was not entitled as a matter of right to notice, either of the original application to the justice of the peace, or of that to the court for a new inquisition, when the first had been set aside. But the question whether the owner was entitled to notice upon the execution of the writ and the condemnation of the property was not presented by the record, nor was it considered by the court. And so in Patterson's Case, 37 Md. 126, the property had been condemned and the damages had been awarded, and the inquisition had been returned to the superior court, and a bill was filed in equity by the owner to restrain the superior court from confirming the inquisition, not on the ground of want of notice, but because the inquisition condemned a fee-simple interest, and for other reasons. And the court decided that the superior court had jurisdiction of the subject-matter, with power to confirm or set aside the inquisition, and there was no ground for the interference of a court of equity. In delivering the opinion of the court, Judge BOWIE, however, does say that no summons or notice to the owner is in most cases provided, but this side remark is not to be construed as a decision of this court that notice was not in such cases required. This question was not before the court.

Where notice  
omitted from  
statute.

Being, then, of opinion that the owner is entitled to notice and the opportunity to be heard, the question is whether the statute now under consideration is invalid because it fails to provide for such notice. And in considering this question we cannot overlook the historical argument, as it may be termed, which was pressed with so much force by the counsel of the appellant.

They have with commendable industry collected a long string of statutes, beginning with the earliest colonial legislation and coming down to the present time. And, passing by the earlier acts for the condemnation of mill-seats and other like uses, we find that all the great works of public improvements in this state—the Chesapeake & Ohio Canal Company, the Baltimore & Ohio Railroad Company, the Baltimore & Washington Railroad Company, the Baltimore & Susquehanna Railroad Company, the Annapolis & Elk Ridge Railroad Company, in fact nearly all the railroads and turnpike roads—have been built under powers of condemnation substantially the same as conferred by section 167 of article 23. The Reports of this state are filled with cases in which these charters and the condemnations under them have been the subject of judicial consideration, and these cases have been argued by the most eminent and learned counsel in the state, and it does not appear that it ever occurred to the court or to the counsel that such condemnations were invalid because the statutes under which they were made did not provide notice to the owner.

But not only in this state, but in the District of Columbia, we find works of internal improvements constructed and property condemned under acts of congress substantially the same in terms as the one now before us; and condemnations under these acts have been a fruitful source of litigation, not only in the circuit court, but in the supreme court; and, though the constitution declares that congress shall pass no act depriving any person of property without due process of law, (Fifth Amend.) it does not appear that it was ever suggested that these acts were in violation of the constitutional rights of the owner.

Statute not in violation of constitution.

This legislative construction and judicial recognition of the validity of these statutes for a period of more than 50 years are entitled to some weight, at least, in deciding whether they are in violation of the constitution,—an objection now made for the first time to their validity.

But we do not rest, nor is it necessary to rest, our decision in favor of the validity of the act in question on this ground. because by every fair rule of construction the act itself, we think, necessarily implies that notice is to be given to the owner. In the first place, it provides that the company may agree with the owner for the purchase of the property, and it is only when the parties are unable to agree, or when the owner is an infant, *feme covert*, or laboring under some disability, that a jury is to be summoned, and summoned too, to meet on the premises, which, in contemplation of law, is al-

Act implies notice.



ways in the possession of the owner or his agent ; and then the company and the owner are each to strike off four names, thus necessarily implying the presence of and participation on the part of the owner in the formation of the jury, and the jury as thus constituted is to decide what compensation is to be paid to the owner, and when their inquisition is signed it is to be returned to the circuit court, thus affording an opportunity to the company and the owner to file objections to its ratification. Now, these several provisions, when considered together, necessarily imply, we think, that notice is to be given to the owner and the opportunity to be heard. And, as the company is the party asking the condemnation of the property,—the actor in the proceeding,—it may be fairly inferred that such notice is to be given by the company or its authorized agent ; and such so far as we are advised, has been the uniform practice in this state. But then it is asked, how is notice to be given to owners who are infants, married women, and non-residents? The act does provide for the condemnation of property belonging to persons laboring under these disabilities, and whether it is to be construed as authorizing notice to be served on the guardian or husband, or by order of publication, are questions not necessary to be considered in this case, because we are now dealing with a case in which the owner is *sui juris*, and upon whom personal notice may be served. It will be time enough to consider the question of notice as to infants and *femes covert*s when that question arises. So, if the constitutional validity of this act is to be tested, as the counsel for the appellee contends, not by what has or may be done under it, but by what it requires to be done, it is, it seems to us, free from objection on this ground.

Being entitled to notice, the question is, at what time shall such notice be given? The act requires, as we have seen,

that the inquisition shall be returned to the circuit court for confirmation, and the argument is that,

if the owner has the opportunity to file objections to its confirmation, this is all the notice to which he is entitled. To this, however, we cannot agree. It has been held, it is true, in some cases, that where a special tax or assessment has been imposed upon property for the public use, and provision is made for contesting the validity of such assessment and the amount "in the ordinary courts of justice, with notice to the person, or there be a proceeding in regard to the property, as is appropriate to the nature of the case, the judgment on such proceedings cannot be said to deprive the owner of his property without due process of law."

**Davidson v. New Orleans**, 96 U. S. 97; **Hagar's Case**, 111

U. S. 701. But the question here is one to be decided under the constitution and laws of this state, and the constitution declares "that the general assembly shall enact no law authorizing private property to be taken for public use, without just compensation, as agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation." Section 40, art. 3. It is the compensation to be awarded by a jury. The jury is the tribunal, and the sole tribunal, by whom the amount of compensation is to be determined, and, this being so, it would seem but fair and reasonable that the owner should have the opportunity of submitting to the jury such evidence as he might deem proper in regard to the value of his property. The inquisition, it is true, must be returned to the circuit court for confirmation, but that court hears and decides the objections filed to its confirmation without the intervention of a jury. The confirming court has no power to increase or diminish the compensation awarded by the jury. Its jurisdiction is confined to the confirmation or setting aside the inquisition, and, it set aside, of ordering of a new inquisition; and to hold that notice and the right to contest the confirmation of the inquisition is sufficient would be to deprive the owner of the right and opportunity of being heard before the jury of inquest, the very tribunal by which the compensation is to be awarded. And, besides, the act, in requiring the owner to strike the jury, necessarily implies that he is to have notice before the jury is sworn; and by notice we mean reasonable notice, in order that he may offer such evidence as he may deem necessary in regard to the question of damages. And, this being so, it is unnecessary to consider whether section 248 of article 23 of the Code applies to the condemnation of property by a railroad company; for so conceding, for the sake of the argument, we are of opinion that in a proceeding to condemn property under that section the owner would be entitled to notice before the property was condemned, and that notice of the pendency of the inquisition in the court for confirmation would not in itself be such a notice as the law requires.

And this brings us to the last objection urged against the validity of section 167, and that is the power of the legislature to provide that the compensation to be paid to the owner shall be assessed by a special jury summoned upon warrant. The language of the constitution is that "the general assembly shall enact no law authorizing private property to be taken for public use without just compensation, as agreed upon between the parties or awarded by a jury, being first paid;" and it is said that this means a common law jury,

and a regular trial in court. But for the opinion of the judge below, it would not have occurred to us there was any difficulty as to this question. Ordinarily, it is true, the term "jury" used in a constitution or a statute will be understood as meaning a common law jury, and, if no other jury had been known in law at the time of the adoption of the constitution of 1851, this argument might have been unanswerable. But it is conceded from the earliest colonial history, and from the formation of the state government down to the adoption of the constitution, the legislature had provided for the taking of private property for public use, upon making compensation to the owner, as assessed by a special jury summoned on warrant. At the same time the legislature provided that, in the opening and altering streets and laying out county roads, the assessment of damages should be made by examiners or commissioners, with the right of appeal to a court of record, where the question of damages was tried *de novo* before a jury. But as to railroads, the legislature without exception provided that the compensation should be awarded by a special jury, summoned as directed by section 167. We have, then, a common law jury for streets and county roads, and a special jury for condemnation in railroad proceedings; and when the constitution says where property is taken for public use the owner shall be entitled to compensation awarded by a jury, why shall it be held to mean compensation awarded exclusively by a common law jury in a regular court trial? The only question before a jury in such cases is the question of compensation, and a jury summoned by warrant to meet on the premises in view and with the opportunity of seeing the property ought to be quite as competent to decide that question, to say the least, as a common law jury sitting in a common law court. And, besides, in two-thirds of the counties of this state there are but two jury terms a year, each about six months apart, and we can hardly suppose the framers of the constitution meant to delay and embarrass the construction of railroads and other public improvements by requiring compensation to be awarded in court by a common law jury. At least, if such had been the intention, if they intended to deny to the legislature the exercise of a power in this respect,—a power which had been exercised from the beginning of the government,—it is but fair to presume this intention would have been declared in plain and explicit terms. What they did mean was to provide in the first place that the owner should have the right or privilege of a jury of 12 men in determining what compensation was to be paid, and

Special jury  
in railroad  
condemnation  
proceedings.

in the next that he should not be deprived of his property till such compensation had been paid ; and such has been the uniform construction of this clause of the constitution from the time of its adoption till the present. The legislature, at every session since 1851, has provided for the taking of private property needed in the construction of railroads and other like improvements upon the payment of compensation assessed by a jury summoned upon warrant. The validity of the condemnations made under these acts has been considered by this court in case after case, and the power of the legislature in this respect has never before been questioned. Such has been the contemporaneous interpretation of the constitution by the legislature and the bench and the bar for a period of 40 years. While the constitution declares that the compensation shall be assessed by a jury, it at the same time leaves to the legislature to provide whether such assessment shall be made by a common law jury or by a jury summoned by warrant, as may be most expedient and proper.

For these reasons the order appealed from will be reversed, and bill dismissed.

**Right of Trial by Jury in Condemnation Proceedings.**—In proceedings to condemn land for railroad purposes, the constitution of Missouri (1875 art. 12, sec. 4) provides that "the right of trial by jury shall be held inviolate in all trials of claims for compensation." And section 12 of the schedule declares that "the provisions of all laws which are inconsistent with this constitution shall upon its adoption cease." *Held*, that all laws, general and special, so far as they deny a jury trial in proceedings to condemn property for public use, are repealed by virtue of said clause in the constitution and the repealing clause of the schedule. *St. Joseph & I. R. Co. v. Shambaugh* (Mo. Nov. 9, 1891) 17 S. W. Rep. 581. The court said : "According to the plaintiff's charter, it is the duty of the judge, if objections to the reviewer's report are sustained, to 'order a review by three other reviewers, who shall proceed in the same manner as is hereinbefore provided.' The charter, as has been said, was enacted in 1857. Section 4 of article 12 of the constitution of 1875 ordains that 'the right of trial by jury shall be held inviolate in all trials of claims for compensation' where an incorporated company shall seek to exercise the right of eminent domain ; and the first section of the schedule declares that 'the provisions of all laws which are inconsistent with this constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this constitution as require legislation to enforce them shall remain in force until,' etc. The railroad company insists that the words, 'shall be held inviolate,' show an intention to preserve a jury trial in those cases and those only, where one was provided for at the time the constitution was adopted; and, further, that the general language of said section 4 of article 12 does not repeal special laws. The amendment of 1873 (Acts 1873, p. 24) to the general law allowed a jury trial to either party when the report of the commissioners should be set aside for good cause shown. It was only in the event that the report should be set aside for cause that the parties were entitled to a jury. By the constitution either party is entitled to a jury as a matter of right. This we have held in the case of

Chicago, S. F. & C. R. Co. v. Miller, 106 Mo. 458. This being so, it is clear that the constitution does more than guaranty their existing statutory rights.

"The remaining question is whether the section of the constitution and the repealing clause of the schedule repeal these existing special charter provisions which provide for a reassessment of damages by viewers or commissioners. It is a rule often asserted and applied that a mere general affirmative statute does not repeal a former special one, unless negative words are used, or unless the two acts are irreconcilably inconsistent. *Manker v. Faulhaber*, 94 Mo. 430, and cases cited. But to accomplish a repeal it is not necessary that the subsequent general law use express words of repeal. Any form of expression showing a clear intention to repeal former special laws will be sufficient. *Sedg. St. & Const. Law* (2d Ed.) 98, note. Here the framers of the constitution were aware that the declaration in the bill of rights concerning the right to a jury trial would not guaranty such a trial in these proceedings to condemn property for public use, and hence they dealt with that subject specially. The section secures the right to a jury in these cases by the assertion of a uniform rule. Looking to the subject-matter and the form of the expression, there is no room for any exception. That it was competent for the people by their constitution, or even through the legislature, to thus change the method of assessing the damages, is not questioned in this case; nor could the right be successfully denied, for the change goes to the remedy only, and interferes with no contract or vested rights. These considerations, taken in connection with the repealing clause of the schedule, are sufficient to show that the constitution does by its own operation repeal all existing laws, whether general or special, so far as they deny a jury trial in these proceedings to condemn property for public use. The constitutional provision in question inserts itself into the laws, and must be taken as a part thereof. This is the conclusion reached in the recent case of *St. Joseph & I. R. Co. v. Cudmore*, 103 Mo. 634, 47 Am. & Eng. R. Cas. 249, and to that ruling we adhere."

**Right of Trial by Jury in Cases of Appeal from Preliminary Assessments.**—Alabama Code § 3210, as amended by Act General Assembly, Feb. 28th, 1889, provides that compensation for lands taken by eminent domain may be ascertained by a jury of 6 men in proceedings in a probate court, and section 3215 allows either party to appeal by bill of exception to the Supreme Court within three months. *Held*, section 3215 is unconstitutional under art. 14 § 7 of the Constitution of Alabama which entitles either party appealing from a preliminary assessment of compensation for condemned lands, to have the damages determined "by a jury according to law," since a jury according to law, is a jury of twelve men, and if an appeal was taken by either party directly from the probate court, the other party would be deprived of his right to a trial by such a jury. *Alabama Midland R. Co. v. Newton*, (Ala. Nov. 3, 1891) 10 So. Rep. 89.

**Revision of Commissioners' Report by Jury.**—By Const. Mo. art 2, § 21 and by statute (art. 12, § 4) the report of commissioners, assessing compensation to be paid for private property taken by a railroad company, may be questioned by either party by demanding a jury. *Chicago, S. F. & C. R. Co. v. Bates* (Mo. March 14, 1892) 18 S. W. Rep. 1133. And in *Chicago, S. F. & C. R. Co. v. Elliott* (Mo. Feb. 8, 1892) 18 S. W. Rep. 901, the court held that either party to proceedings assessing damages is entitled as a matter of constitutional right to have the damages re-assessed by a jury.

**Questions for the Court and Jury in Proceedings to Condemn Land.**—In condemnation proceedings the question as to the petitioner's right to condemn the land is for the court. The only question for the jury is that of

the measure of compensation for the land taken. *O'Hare v. Chicago, M. & N. R. Co.* (Ill. Oct. 31, 1891,) 28 N. E. Rep. 923.

**Questioning Commissioner's Report by Demanding Jury.**—In *Chicago, S. F. & C. R. Co. v. Miller*, 106 Mo. 458 the court held that the report of commissioners, in condemnation proceedings, on the question of compensation, may be questioned by either party by demanding a jury.

**Damages Caused by the Construction of the Road a Question for the Jury.**—In a suit to assess damages for land taken for railroad purposes it is reversible error to ask a witness what were the damages caused by the construction of the road. Such questions are for the consideration of the jury. *Hartley v. Keokuk & N. W. R. Co.*, (Iowa May 23, 1892) 52 N. W. Rep. 352.

**Agreement to Submit Question of Damages to Arbitration—Valuation of Improvements.**—Where an agreement between a land owner and a railroad company to submit the question of damages for a right of way to arbitration provided that, if either party should fail to abide by the decision of the arbitrators, he or it should pay to the other a certain sum as liquidated damages, *held*, that in an action by the railroad to recover such damages, testimony by the defendant, that the president of the company directed the arbitrators not to value the improvements, as the company did not want them, was properly excluded. *Odum v. Rutledge & J. R. Co.* (Ala. Nov. 11, 1891) 10 So. Rep. 222.

**Proceedings by Certiorari.**—Where land has been condemned for railroad purposes and the damages have been assessed by a jury and paid into court, on a petition by the railroad for an injunction to restrain a person from building a canal across said land, the defendant cannot urge that the railroad company's charter has expired, since such objection should have been taken by proceedings at law by *certiorari*. *Packard v. Bergen Neck R. Co.*, 48 N. J. Eq. 281.

**Proceedings before State Railroad Commissioners not Removable to Federal Courts.**—A petition filed by a railroad company with the state railroad commissioners, for the mere purpose of obtaining their consent to the taking of certain lands by condemnation proceedings, not being a suit within the original jurisdiction of the federal courts, is not removable. *New York, New Haven & Hartford R. L. Co. v. Cockcroft*, 49 Fed. Rep. 3.

**Time for Filing Petition for Removal of Cause.**—Where a statute (Code Civil Proc. N. Dak. section 3000) provides that in proceedings to condemn land for railroad purposes either party may demand a jury trial within 30 days from the filing of the commissioner's report, but requires no further pleadings for such trial, *held*, that for the purpose of removal to the federal court the demand for a trial by jury is equivalent to the filing of an answer in ordinary suits and under Act Cong. March 3rd 1887, section 3, where the petition for removal is filed after the expiration of the 30 days, the case will be remanded to the state court. The court said: "The act of March 3, 1887, has definitely fixed the time within which a case may be removed. The act is restrictive in its nature, as is manifest from the recent decision of the supreme court of the United States, *Fisk v. Henarie*, 142 U. S. 459, and many other cases construing this act. By section 3 of the removal act it is provided that the petition must be made and filed in the state court at the time or at any time before the defendant is required by the laws of the state or the rules of the state court in which the suit is brought to answer or plead to the declaration or complaint. By the Code of this state the defendant is required to answer in ordinary actions of a civil nature within 30 days after the service of the summons, when the complaint is served with it, or within 30 days after the service of the complaint, upon demand, when the summons is served alone. Comp. Laws, chap. 9, Code Civil Proc. How is issue joined in this class of actions, under sec-

tion 3000, above quoted, and when must that issue be joined? The statute provides that 'either party may, within thirty days after the filing of the report of the commissioners, file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by the jury, and the trial shall be conducted, and judgment entered on the verdict, in the same manner as civil actions in the district court.' There is no further provision of statute in this state relating to any further pleadings or issue in this class of actions. When the demand for a jury trial is filed, the case stands for trial like any ordinary action of ejectment; the railroad company seeking the appropriation of the land described in the petition, on the one side, as plaintiff, except that it must pay the just compensation, and the owner of the land, on the other side, as defendant, insisting upon his just compensation; that being the only question for trial and determination. By operation of law in this state the issue is joined by the filing of a written demand for a jury trial by either party. No other or further pleading is required by the statute, and there is no rule of court requiring further pleadings, so far as I am advised. The case stands substantially the same as if the statute provided that, upon filing a demand for a trial by jury, formal pleading must on the same day, or some subsequent day, be filed. It was competent for the legislature to so provide. It could not be successfully contended that the right of removal existed under the act of March 3, 1887, after the answer had been filed and issue thus joined in the statute so providing. It must be conceded that under such a statute the petition for removal must be made and presented before the time for answering had expired. But the statute has in effect provided that the filing of a written demand for jury trial is equivalent to that. Each party is fully advised by the terms of the statute that a demand for a jury trial must be made within 30 days after the filing of the report of the commissioners. If it is filed before the end of the 30 days, the defendant has still the last day to make and file his petition for removal. If not filed till the last day, he must remove on that day, or his right so to do is lost. In other words, the defendant, the land owner, who alone is entitled to remove the case to the federal court, must do so after the proceeding has taken on the form of a suit at law of a civil nature, and within 30 days after the filing of the report of the commissioners. *Minneapolis St. P. & S. S. M. R. Co. v. Nestor* (C. C. N. Dak.) 50 Fed. Rep. 1.

**Power to Require Land Owner to File Bill of Particulars Lies in Discretion of Court.**—In condemnation proceedings instituted by a railroad company, and appealed by the land owner to the district court, the railroad company filed a motion in the district court asking the court to require the land owner to file a petition or bill of particulars, which motion was overruled by the court. *Held*, that the matter rested wholly within the judicial discretion of the trial court, and under the facts of this case the supreme court cannot say that such court abused its discretion. The court said: "With regard to the aforesaid motion to require the plaintiff, Kennedy, to file a petition or bill of particulars. We think this matter rested wholly within the judicial discretion of the trial court, and we cannot say that such court abused its discretion. No affidavit or other evidence was presented in support of the motion, and nothing was presented in the case tending to show that without the petition or bill of particulars the railroad company would in any manner or degree be embarrassed in presenting any defense which it might wish to present. It did not show that the petition or bill of particulars would be of any benefit to it. The third alleged error is that the court below rendered an ordinary personal judgment against the railroad company for the damages assessed against it, when in fact the judgment should have been in the nature of an award of damages such as is usually rendered in condemnation proceedings, and for costs; and

the case of *Railroad Co. v. Wilder*, 17 Kan. 240, 247, is cited." *Kansas City, W. & N. W. R. Co. v. Kennedy* (Kan. June 11, 1892) 30 Pac. Rep. 126.

**Granting New Trial Where There Is Evidence of Additional Damages.**—It being conceded on the trial of an appeal from the verdict of a jury summoned by the sheriff in a statutory proceeding to assess damages claimed by a land owner against a railroad company for appropriating his land and constructing a railroad over the same, that the value of the land actually taken and used by the company was \$400, for which amount only a verdict in favor of the land owner was rendered on the appeal, and there being evidence of other and additional damages to his land besides that so taken and used, the court below did not abuse its discretion in granting the plaintiff a new trial. The court said: "'When the case was before the jury there was no question made as to the value of the land. It was claimed by Jones and admitted before the jury by counsel for the road that he should be allowed \$400 for the land, [appropriated by the railroad company for right of way,] and the only question was if there was any damage besides, and, if so, how much. The jury found the \$400 only. On review of the evidence, it seems clear that there was other damage and no counter evidence to offset it. The fact seems proved that such damage was done and the plaintiff was entitled to some damages therefor,' etc. The plaintiff testified that, besides the land appropriated by the railroad, it caused him to throw out two or three acres which were open land in cultivation, and which, because of the running of the railroad, he could not keep in cultivation; that the land appropriated and the land he was compelled to abandon amounted to fourteen or fifteen acres; that the running of the right of way necessitated his moving his whole line of fence from one side to the other of the railroad, which threw the railroad into his pasture; that the right of way is not fenced; that he was compelled to move his gates three times; that it is much more inconvenient now for him to get his timber than it was before the road was built, and it compels him to haul his rails at least half a mile further; that the railroad, in constructing its roadbed and right of way, destroyed a portion of a dam on the premises, so that it could not be repaired, and so that he could not use it without infringing upon the roadbed, which has decreased the value of his entire lot of land, etc.; that the railroad has not benefited the lot of land; that the land that was appropriated by the railroad, some fourteen or fifteen acres in all, was worth \$25 per acre, and the land had been damaged, outside of the land actually appropriated, \$2,000 at least; the road running through the place damaged the lot of land \$1,000, and the deprivation of the water power caused a damage of \$1,000 more; when the road came the dam had a break in it, which had been there two, three, or four years, and he had temporarily abandoned it, and he had stated before that he did not know that he would use it again for power purposes, but did intend to build it up again for pleasure, fishing, etc. Another witness was introduced whose testimony tended to corroborate the testimony of plaintiff. The testimony of these two witnesses was the only evidence before the jury." *Georgia Southern & F. R. Co. v. Jones* (Ga., Aug. 27, 1892.) 15 S. E. Rep. 824.

**Costs and Attorney's Fees in Condemnation Proceedings.**—By Acts North Carolina, 1879, chap. 41, the taxation of attorney's fees in the bills of cost which had theretofore been allowed was prohibited. In the Code of 1883 no provision for taxation of counsel fees was made, except in section 1948, which permits such allowance to counsel appointed by the court to represent the rights of any party in interest who, or whose residence is unknown, in proceedings to condemn land for railroad purposes. The reference in section 1946 to the costs and counsel fees allowed by the



court is to such counsel fees as the court was authorized by law to tax and refers only to counsel fees provided for by section 1948. Consequently where the counsel is not appointed by the court, the fees cannot be taxed in the bill of costs. *North Carolina R. Co. v. Goodwin* (N. Car., March 8, 1892.) 14 S. E. Rep. 687.

## GULF, COLORADO & SANTA FE R. CO.

*v.*

### KERFOOT.

(*Texas Supreme Court, June 17, 1892.*)

**Eminent Domain—Review on Appeal of Separate Proceedings Heard Together.**—Where separate proceedings to condemn a right of way over two tracts of land were heard together, and damages assessed by the commissioners to both tracts in a single sum, an exception to the award of the commissioners, though made on the ground that the assessment was inadequate as to one tract, was in effect an exception to the entire assessment, and brought the whole case before the court for review.

**Amendment of Exception as to One Tract.**—The appeal from the award as to both tracts being before the court, it was not error to permit appellee to so amend his pleading as to bring in review the action of the commissioners in assessing the damages to the tract of which no objection was originally taken.

APPEAL from Brown County District Court.

Condemnation proceedings.

*J. W. Terry*, for appellant.

*Thos. Maples and Bell & Drane*, for appellee.

**GAINES, J.**—The appellant on July 25, 1885, filed two applications with the county judge of Brown county to condemn a right of way over two tracts of land, known, respectively, as the "E. M. Pease" and the "Nathan Brookshire" surveys, each of which was alleged to belong to the appellee, J. D. Kerfoot, and F. H. Kerfoot. The same commissioners were appointed in each case, and, though the applications were to condemn each tract separately, they rendered but one award, assessing the damages to both at \$125 in the aggregate. Thereupon the appellant filed the following objection: "Now comes J. D. Kerfoot, and excepts to the award of the commissioners appointed by the honorable judge of this court to fix the damage done him by the proposed taking of right of way for the road of the above-named plaintiff over defendant's tract of land known as the 'E. M. Pease' one-third league of land, because the sum of \$125 awarded as compensation for such taking is wholly insufficient. Defendant says that he uses said tract of land as a sheep and horse ranch, and the right of way over the said tract as laid out by plaintiff runs through

Statement  
of case.

a corner of said tract, and cuts off in the shape of a triangle about 150 acres of said tract, and renders the same entirely valueless to defendant, and by reason of its shape renders it of little value to any one else; that defendant's damages, on a reasonable and fair estimate, are not less than the sum of \$1,000."

On account of the disqualification of the county judge, the case was transferred to the district court, in which the judgment was rendered from which the appeal is prosecuted. Before the case was called for trial, the appellee was allowed to file an amended objection to the award, in which he complained in substance, that the award was insufficient in amount, both as to the Pease survey and as to the Brookshire tract, and alleged that his damages amounted to \$2,000. This pleading was excepted to by the appellant upon the ground that, since the appellee had failed to object to the award as to the Brookshire survey at the time it was made, it was too late to make objection as to that tract after the case had been brought to the district court. The court overruled appellant's exception, and its ruling is assigned as error.

It may be conceded that, if the commissioners who awarded the damages had assessed the damage to each tract of land separately, the appellant should not have been permitted, after an appeal to the court, to so amend his pleading as to bring in review the action of the commissioners in assessing the damages to the tract of which no objection was originally filed. But here, although separate proceedings were instituted for the condemnation of the several tracts, it appears that the commissioners, without objection from either party, heard the two cases together, and assessed the damages to both in a single sum. We are of opinion, therefore, that the exception that was originally filed to the award, although it named only one tract, was, in effect, an exception to the entire assessment, and brought the whole case as consolidated before the court for review. If the amount awarded was not sufficient to cover the damage to the Pease survey alone, it followed that it was not sufficient to cover the damages to both. The appeal from the award as to both tracts being before the court, we think it was not error to permit the appellee to amend his objection so as to make it more specific, and to enlarge the amount of damages claimed.

It having become a case in court, we see no reason why the statute which permits pleadings to be amended should not apply to it.

We find no error in the judgment, and it is affirmed.

Amendment  
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— Injury to entire tract; owner is entitled to have his compensation assessed for. *Kremer v. Chicago, M., etc., R. Co.* (Minn.), 382.

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Illegal entry and ouster. Appellate court may withhold its mandate of possession to allow a reasonable time for the company to institute condemnation proceedings. *Jacksonville, etc., R. Co. v. Adams* (Fla.), 544.

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—upon petition by railroad company. Vested liens not displaced by unsecured claims. Court will require receiver to hold property for benefit of all. *Quincy, etc., R. Co. v. Humphreys* (U. S.), 38.

Leased lines operated by receiver. Liability of receiver as assignee for agreed rentals. *Quincy, etc., R. Co. v. Humphreys* (U. S.), 38.

—operated by receiver. Diverted earnings. Rental not entitled to priority over mortgage liens. *Quincy, etc., R. Co. v. Humphreys* (U. S.), 38.

Preference of employees' wages does not include claim by merchant for supplies furnished employes under contract with company. *Finance Co. v. Charleston, etc., R. Co.* (U. S.), 55.

Priorities. Claim by merchant for supplies furnished employes entitled to preference over claim of interest on bonds. Claim is a charge on reorganization and on proceeds of sale. *Finance Co. v. Charleston, etc., R. Co.* (U. S.), 55.

—Claim of material man for wares furnished held to have priority over second mortgage, but not over first mortgage. *Bound v. S. Car. R. Co.* (U. S.), 58.

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**RIGHT OF WAY.**

Abandonment. Mere non-user of right of way granted will not extinguish the easement where there is no adverse possession, or where abandonment cannot be inferred from acts of company. *Roanoke v. Kansas City, etc., R. Co.* (Mo.), 426.

—Non-user by company and re-occupancy by grantor for five years held to show abandonment and land reverts to owner. *Roanoke v. Kansas City, etc., R. Co.* (Mo.), 426.

Adverse possession; company cannot acquire title to fee by, where it enters as a trespasser. *Texas W. R. Co. v. Wilson* (Tex.), 364.

Application for assessment of damages by railroad company in action to recover land unlawfully occupied by it. Motion addressed to discretion of court. *Kremer v. Chicago, M., etc., R. Co.* (Minn.), 382.

Appropriation by another company. Company owning right of way held entitled to damages for any advantage gained by appropriating company. *Chicago, etc., R. Co. v. Cedar Rapids, etc., R. Co.* (Iowa), 438.

—Evidence held not to show that first company was prevented from constructing its road thereby. Amount of damages awarded. *Chicago, etc., R. Co. v. Cedar Rapids, etc., R. Co.* (Iowa), 438.

Appropriation of graded right of way of one company by another company; rule for estimating damages to which first company is entitled. *Chicago, etc., R. Co. v. Cedar Rapids, etc., R. Co.* (Iowa), 438.

Condition subsequent to grant of right of way. Failure to build bridge held not to forfeit grant. *Roanoke v. Kansas City, etc., R. Co.* (Mo.), 426.

Consideration of deed granting right of way; parol evidence held admissible to show that consideration was location of depot. *Gulf, C. etc., R. Co. v. Jones* (Tex.), 415.

Construction of deed reserving passway connecting two grants.

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Intention to annex the right of passing to the larger tract as a perpetual easement. *White v. New York & N. E. R. Co.* (Mass.), 392.

Conveyance. Second railroad constructed on right of way under grant by first company held additional burden, entitling land owner to compensation. *Blakely v. Chicago, Kansas, etc., R. Co.* (Neb.), 368.

Deed of right of way. Condition for free passage of grantor and his "family;" grandchild of grantor not included. *Dodge v. Boston & P. R. Co.* (Mass.), 388.

Delivery of contract for right of way in consideration of construction of road on condition that no use should be made of it unless necessary; parol evidence to show. *Humphreys v. Richmond & M. R. Co.* (Va.), 397.

Delivery of contract for right of way. Unauthorized delivery by president who held contract on condition; contract held void, and owner entitled to damages. *Humphreys v. Richmond & M. R. Co.* (Va.), 397.

Easement by prescription; burden of proof on company claiming, is not sustained by proof of original and present occupancy, without proof that such occupancy has been continuous. *Texas W. R. Co. v. Wilson* (Tex.), 364.

—Sufficiency of testimony to show intent of railroad company to prescribe for easement for right of way. *Texas W. R. Co. v. Wilson* (Tex.), 364.

Ejectment; action by trustee of land held for perpetual right of way for all railroads at certain place not maintainable. *Elyton Land Co. v. South & North Ala. R. Co.* (Ala.), 371.

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Estoppel of railroad company holding under deed, to deny that grantor had such interest in it that he could carve out a pass-way reserved for the perpetual benefit of land which he occupied. *White v. New York*

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& N. E. R. Co. (Mass.), 392.

Location of depot; authority of right of way agent to agree to, held to be shown by circumstances of case. *Gulf, C. etc., R. Co. v. Jones* (Tex.), 415.

Power to take temporary possession of land for purpose of "forming roads" does not include taking for purpose of forming railroad. *Morris v. Tottenham, etc., R. Co.* (Eng.), 360.

Use of right of way. Bridge used for vehicles and for passengers, but not cutting off access to ferry landing; owner of ferry franchise not entitled to compensation. *Kansas & A. V. R. Co. v. Payne* (U. S.), 518.

—for ordinary travel and as an approach to bridge; no interference with ferry franchises shown and injunction refused. *Kansas & A. V. R. Co. v. Payne* (U. S.), 518.

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**STATIONS.**

Defective premises. Fact that approach to boat landing is maintained in street does not relieve company from liability for defects. *Skottowe v. Oregon Short Line* (Ore.), 444.

Location of depot as consideration of grant of right of way. See **RIGHT OF WAY**.

Personal injuries. Passenger going aboard boat run by railroad company in the evening, instead of waiting until morning, held not to have shown contributory negligence. *Skottowe v. Oregon Short Line* (Ore.), 444.

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Act relating to formation and regulation of railroads held sufficiently broad to confer power on railroads chartered by special law. *Stockton v. Central R. Co.* (N. J.), 1.

Title of act. Act for formation and regulation of railroads held to have sufficient title. *Stockton v. Central R. Co.* (N. J.), 1.

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Stockholder may maintain bill to

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enjoin rival railroad company from appropriating location and works of his company where he shows that directors are acting in sympathy with rival company. *Weidenfeld v. Sugar Run R. Co.* (U. S.), 505.

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Crossing track of another company in city street not permitted unless compensation is first made. *Georgia, M. & G. R. Co. v. Columbus S. R. Co.* (Ga.), 538.

Laying out street across railroad; city may exercise right although railroad is greatly inconvenienced. *Illinois Cent. R. Co. v. Chicago* (Ill.), 528.

— across railroad. Discretion of city council to extend streets either over or across tracks; court will not interfere with. *Illinois Cent. R. Co. v. Chicago* (Ill.), 528.

— across railroad. Duty of city to restore track. Statute only requires such restoration as not to impair its usefulness more than is necessary. *Illinois Cent. R. Co. v. Chicago* (Ill.), 528.

— across railroad. Right of city includes extension of street across railroad "yard." *Illinois Cent. R. Co. v. Chicago* (Ill.), 528.

— crossing railroad tracks; company entitled to compensation for cost of erecting gates at crossings. *Commissioners v. Detroit, etc., R. Co.* (Mich.), 525.

— crossing railroad yard authorized by statute. *Commissioners v. Detroit, etc., R. Co.* (Mich.), 525.

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Agreement between companies forming association held not to amount to transfer of franchises and corporate powers of different companies. *United States v. Trans-Missouri F. Assoc.* (U. S.), 458.

Congressional anti-trust law does not apply to combinations or agreements between railroad companies. *United States v. Trans-Missouri F. Assoc.* (U. S.), 458.

— Railroad traffic association held not a combination or conspiracy in restraint of trade in violation of statute. *United States v. Trans-Missouri F. Assoc.* (U. S.), 458.

Monopolization of commerce; traffic association agreement held not to constitute, in violation of congressional anti-trust law. *United States v. Trans-Missouri F. Assoc.* (U. S.), 458.

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Compensation of trustee under mortgage awarded at rate allowed to executors and administrators. *Woodruff v. New York, etc., R. Co.* (N. Y.), 89.

Payment for services. Trustee under mortgage held entitled to allowance out of trust property for expenses, including attorney's fees. *Woodruff v. New York, etc., R. Co.* (N. Y.), 89.

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*Chicago* (Ill.), 528.

"At back of garden." *White v. N. Y. & E. R. Co.* (Mass.), 395*n*.

"Family." *Dodge v. Boston & P. R. Co.* (Mass.), 388.

"Farming roads." *Morris v. Tottenham, etc.*, R. Co., 360.

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"Mineral lands." *Northern Pac. R. Co. v. Barden* (U. S.), 236.

"Necessary." *Morris v. Tottenham, etc.*, R. Co. (Eng.), 360.

"Operating." *Boston, etc., R. Co. v. Boston & L. R. Co.* (N. H.), 106.

"Over." *Illinois Cent. R. Co. v. Chicago* (Ill.), 528.

"Running connections." *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.* (U. S.), 162.

"Successor." 71*n*.























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